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AN INTRODUCTION TO AND EVALUATION OF THE 2019 BELGIAN COMPANIES ACT – PREPARING FOR THE PREVIOUS WAR?

WP 2023-11

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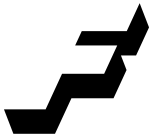

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This article discusses some aspects of the completely new Companies Act ("BCCA") adopted in Belgium in 2019. Even though the reform touched upon all aspects of company law and all company types, its main goal was to roll back Belgian goldplating of EU company law Directives and to turn the hitherto very rigid Belgian private company into a very flexible, contractual vehicle with little mandatory law applicable to it, except for rules on creditor protection and directors' disclosure duties to make sure general meetings decide on issues on an informed basis. As part of this reform, the concept of legal capital (not just minimum capital requirements) was abolished for the private company. In order to allow Belgian company to better compete in the light vehicle competition, Belgium moved from the real seat doctrine to the incorporation theory. For public companies, the main reform was probably the introduction of loyalty shares, which (so far) did not succeed in attracting more listings to the Brussels stock market, but did allow existing controlling shareholders to cement their control with a smaller stake than before.

Except perhaps for the partially failed reform of the rules on changes to class rights, the reform was very successful in increasing legal certainty about many issues about which no authoritative case law exists. The rationale for the reduction of the number of company forms was less convincing, and the reform of the cooperative company was botched because of the conflicting demands emanating from the influential cooperative lobby. But in a way, the reform fought the last war (the light vehicle competition) while arguably not enough attention was paid to enabling venture capital and private equity contracting and the capital structures that go with these investments

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

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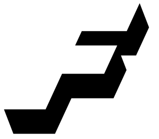

An introduction to and evaluation of the 2019 Belgian Companies Act – Preparing for the previous war?

Hans De Wulf[1]

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This article discusses some aspects of the completely new Companies Act ("BCCA") adopted in Belgium in 2019. Even though the reform touched upon all aspects of company law and all company types, its main goal was to roll back Belgian goldplating of EU company law Directives and to turn the hitherto very rigid Belgian private company into a very flexible, contractual vehicle with little mandatory law applicable to it, except for rules on creditor protection and directors' disclosure duties to make sure general meetings decide on issues on an informed basis. As part of this reform, the concept of legal capital (not just minimum capital requirements) was abolished for the private company. In order to allow Belgian company to better compete in the light vehicle competition, Belgium moved from the real seat doctrine to the incorporation theory. For public companies, the main reform was probably the introduction of loyalty shares, which (so far) did not succeed in attracting more listings to the Brussels stock market, but did allow existing controlling shareholders to cement their control with a smaller stake than before.

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[1] Professor of company law, Ghent University, Financial Law Institute. I thank my Ph.D. students L. Van Coillie and L. Van Marcke for filling out many of the footnotes, and Jeroen Delvoie and co-authors for sharing the draft of their paper on loyalty shares published in this issue of *ECFR*.

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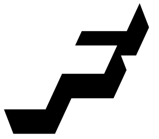

Introduction

On May 1, 2019, the new Belgian Code on Companies and Associations (**BCCA**) became effective[2], replacing the 1999 codification of Belgian company law and the separate 1921 Act on private non-profit organisations. Arguably, this was the most thorough reform of Belgian company law since the introduction in 1935 of the private company (then called BVBA-sprl[3])

[2] The BCCA (official Dutch-French abbreviations: "WVV" and "CSA") was introduced by art. 2 of the Act of 23 March 2019 ("tot invoering van het Wetboek van Vennootschappen en Verenigingen en houdende diverse bepalingen", *Belgisch Staatsblad (BS)* 4 April 2019; the *BS* is Belgium's Official Gazette). It became effective on May 1 2019, but only became applicable to companies that had acquired legal personality before May 1 2019 on January 1 2020. The other articles of that March 23 2019 Act amend company law provisions in other legislation (Code of civil Procedure, Code of Private International Law, …) and deal with transitional law questions. The BCCA is accompanied by a Royal Decree (= implementing regulation) of 29 April 2019 ("tot uitvoering van het Wetboek van Vennootschappen en Verenigingen", *BS* 30 april 2019; mainly on disclosure obligations and accounting law).

The parliamentary history can be consulted at www.dekamer.be , under "documents 54 3119". The important official Explanatory Memorandum ("memorie van toelichting") is available on that website as *Parl.St.* Kamer, 54 3119/001, p. 5-388; The main amendment to the BCCA so far has been the Act of 28 April 2020, *BS* 6 May

2020, implementing the 2nd Shareholder Rights Directive, but also containing several dozen "repair" amendments, rectifying "small" mistakes (as e.g. when a section that should have been applicable to both public and private companies, only mentioned public companies) in the original BCCA. All Belgian university law schools worked together for a series of conferences and accompanying books on the new Code, see H. DE WULF and M. WYCKAERT (eds.), *Het WVV doorgelicht*, Mortsel, Intersentia, 2021, 786p (Dutch-language universities); O. CAPRASSE, H. CULOT AND X. DIEUX (eds.), *Le nouveau droit des sociétés et des associations- Le CSA sous la loupe*, Limal, anthemis, 2019, 636 p. (French-speaking universities): E. POTTIER (ed.), *Le code des sociétés et associations: (r)évolution ?- Het Wetboek van vennootschappen en verenigingen: (r)evolutie ?,* Brussels, Larcier, 537 p. (bilingual book issued by TBH-RDC, the leading Belgian business law review). The leading up to date versions of handbooks that deal with all of Belgian company law, are: H. BRAECKMANS and R. HOUBEN, *Handboek vennootschapsrecht*, second edition, Antwerp, Intersentia, 2021, 974p; D. VAN GERVEN, *Handboek Vennootschappen - Algemeen deel*, second edition, Brussels, Intersentia, 2020, 1564p and J. MALHERBE, Y. DE CORDT, P. LAMBRECHT, P. MALHERBE and H. CULOT, *Droit des sociétés*, fifth edition, Brussels, Larcier, 2020, 1212p. A brief introduction to the BCCA in English was provided by C. VAN DER ELST, "21st Century Company Law in Belgium", 17 *European Company Law* , 2020, issue 2, 25-36. 2024 should see the publication of the second edition of A. VICARI and A. SCHALL (eds.) *Company Laws of the EU*, Munich, Beck, with an extensive (120 pages) introduction to Belgian company law by myself, D. Bruloot and K. Maresceau.

[3] Here and hereafter we refer to the company types by their official (see art. 1:5 BCCA) Dutch and French acronyms, although for brevity's sake, we will in later sections only use the Dutch acronym, e.g. "**BV**" for private company and "**NV**" for public company. (Belgium has two official languages, Dutch and French, and all legislation is adopted and published in a bilingual version. There is no translation into English of the BCCA, not by government services nor by law firms or consultancies.)

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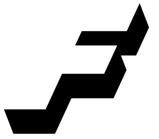

in addition to the older public (NV-SA) and cooperative (CV-SC) corporate forms. This codification contains the statutory rules on private law organizations in Belgium, i.e. on partnerships, corporations, non-profit associations and public and private foundations, including the rules on mergers, spin-offs and related transactions, but excluding securities law[4] and the statutory rules on public takeover bids[5]. This Article will only dwell on the rules concerning companies[6], i.e. partnerships[7] and corporations[8]. The essay will evaluate whether the new Code can be regarded as a success from a policy perspective.. Readers should be informed that I'm not totally unbiased towards this topic, since I was a member of the four-person "expert committee"[9] that played a central role in drafting the new legislation, at the

[4] Such as prospectus rules or insider dealing and market manipulation (MAR) rules. As readers will know, for EU member states, securities regulation is largely (but by no means exclusively) dealt with at the "federal", i.e. EU level.

[5] These are governed by a separate Act and, more importantly, Royal Decree ("Royal decrees" in Belgium are substantively legislation but issued by the government without parliamentary approval and therefore needing a basis in (parliament-approved) statute) both of 27 April 2007, as amended. This legislation is available in English at the website of Belgium's financial markets supervisor FSMA: https://www.fsma.be/sites/default/files/legacy/sitecore/media library/Files/fsmafiles/wetgeving/kb_ar/en/rd_27-04-2007.pdf.

[6] However, the reader should not be under the impression that this article provides an overview of all the main changes to Belgian company law introduced by the BCCA. I have focused on a few topics that could be of interest to a non-Belgian audience and then mostly topics that illustrate the trend to make the private company more flexible.

[7] Understood as companies in which the shareholders are (jointly) liable for the company's debts. In Belgium-and in this article- both partnerships and corporations are called "companies" ("vennootschappen" in Dutch, "sociétés" in French). Under Belgian law there is no link between having legal personality and the accompanying legal capacity, and limited (shareholder) liability: most partnerships enjoy unrestricted legal personality and capacity, but their shareholders are still liable for the company's debt.

[8] Understood as companies in which all shareholders enjoy limited liability for the company's debts. NV (public), BV (private) and CV (cooperative) are the three corporate forms in Belgium.

[9] I'm a full-time professor of corporate law at Ghent University. The other members were (with their positions at the time) Marieke Wyckaert (partner with the law firm of Eubelius and part-time professor of corporate law, KULeuven); Jean-Marie Nelisen Grade (former head of the corporate law department of Linklaters in Brussels and retired part-time professor at KULeuven); and Paul-Alain Foriers (partner with the law firm of Simont Braun and part-time professor of company law and contract law at Université Libre de Bruxelles). While this group was in control of drafting the complete Code-with ultimate control and policy choices of course in the hands of the Minister of Justice, who before entering politics was himself a professor of company law- we outsourced the first drafts of certain parts of the Code to in total 14 other authors, e.g. the parts on liquidation, on the general meeting of bondholders, on statutory mergers, on non-profit associations and on the "geschillenregeling" (a set of court procedures in private companies that allows one shareholder to forcibly expel another shareholder, or

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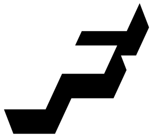

request of the Minister of Justice at the time and driving force behind the reform, former company law professor Koen Geens.

The BCCA was built in about 5 years[10]: one year of preparation by the Belgian Center for Company Law[11], two years of drafting the basic text, and two years of political consultation and discussion, including in parliament, leading to hundreds of amendments of the original draft. This means most work was done within one 4 year legislature, and readers should be aware that this is the only or at least most promising way of getting a big legislative job done in Belgium: one needs the patronage of a single (cabinet) Minister of Justice, since the civil service is not strong enough in an area like business law to lift big initiatives like this one from one minister to his successor and ministers themselves are seldom inclined to continue important legislation started by their predecessors. The reform was prepared by academics (many of whom were also practicing attorneys) before handing over to politics, and a group of six professors, including the four future drafting committee members, did a tour of the most important Belgian institutionalized "representative"/lobby organisations before work on the Code started in earnest. But the drafters were acutely aware there was no time for extensive comparative law research or an economic cost-benefit analysis[12] which could have provided a more solid basis for the whole reform effort -one thinks here of the extensive reports that were drafted in advance of the 2006 English Companies Act.[13] Nevertheless, the Dutch company

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have the defendant buy the plaintiff's shares; used very often in Belgium to resolve serious conflicts between shareholders in unlisted corporations).

[10] For those who read Dutch, I have written a detailed history of how the BCCA came about, including the political economy and lobbying, in H. DE WULF, "De totstandkoming van het Wetboek van vennootschappen en verenigingen : enkele impressies over het maken van wetgevingsworsten", in I. Claeys (ed.), *Recente wetgevende hervormingen : nieuw en beter?*, Mechelen, Kluwer, 2021, 85- 152.

[11] This is a non-profit organization set up in 2013 at the initiative of Guy Horsmans and Koen Geens by 14 Belgian corporate law professors, to assemble all academics dealing with company law in Belgium. See https://bcv-cds.be/. The organization today organizes debating sessions on corporate law, conferences, and Ph.D. seminars, and also issues opinions on draft legislation or sometimes provides help to the civil service in e.g. drafting the implementing legislation for European Directives. But the first project of the BCV-CDS was to organize an academic conference where duos of academics each tackled a potential area of corporate law reform, and subsequently three working groups of about 10 people each prepared a joint 95 p. document outlining which parts of the then (2014) existing Companies Act were ripe for change. When he became Minister of Justice, Koen Geens in July 2015 accepted this document as the basis for a reform.

[12] An official impact analysis is required for Belgian legislation, but this often is a superficial document which can be drafted in a few hours, and is mainly intended for the "Inspectors of Finance", i.e. a sort of Office of Budgetary Controls that does indeed check, for any government measure, whether the budgetary implications are acceptable. This official impact analysis cannot in any case be compared to a real economic cost-benefit analysis.

[13] See for a partial archive of such documents https://www.cbr.cam.ac.uk/research/research-projects/completed-projects/company-law-review/#item2 and for the 2005 DTI white paper, see

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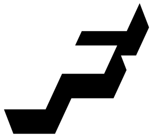

law reforms that produced the "flex BV" were an important inspiration[14] and the Dutch corporate law environment causes envy in some in Belgium.

I. Belgium wants to take part in the European light vehicle competition

1. The Dutch example

The Netherlands – which despite the protestations of its scholars really do have the mindset of a Delaware of Europe, with a judiciary that is extremely open to accepting jurisdiction in international cases to boot[15]- have succeeded in making their corporate environment attractive to foreign entrepreneurs and already existing foreign companies. Their law on private companies is extremely flexible- for instance allowing dividend distributions even in companies with negative net assets. Their stakeholder-oriented law on listed companies concentrates power in the executive board, i.e. top management, and allows all kinds of "oligarchic clauses" in the articles that cement the power of management and controlling shareholders, including minority controllers. The Netherlands also allow for a liberal system of multiple class share structures, although listing rules and the (comply or explain) Corporate Governance Code try to limit the use of some arrangements in listed companies. These control-cementing arrangements, sometimes involving the use of the notorious "stichtingen" (foundations), allow for the provision of a wide array of anti-takeover defenses.[16] In the "Enterprise Chamber" ("Ondernemingskamer"), a division of the Amsterdam Court of

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https://www.treasurers.org/node/3255. Further legislative history can be found at https://www.legislation.gov.uk/ukpga/2006/46/notes/division/12.

[14] Koen Geens himself has always been a close student of Dutch developments, and the BCV-CDS invited Harm-Jan de Kluiver (professor at University of Amsterdam) to explain the essentials of the Dutch reforms to a Belgian audience; in addition the article by Diederik Bruloot looking at whether the Dutch reforms contained anything that could be interesting for Belgium (D.BRULOOT, "Het nieuwe Nederlandse B.V.-recht : overzicht en Belgische aandachtspunten", *TRV* 2014, 445-473), played a guiding role.

[15] See the Dutch soul searching on whether the Netherlands is attractive as a jurisdiction for companies to incorporate in Van der Heijden Instituut (eds.) *Nederland, Het Delaware van Europa ?*, Wolters Kluwer, 2018, 254 p.

[16] One of the latest additions is the notorious "reflection period" that was introduced by an Act of 23 March 2021 reform that became effective on May 1 2021 and introduced art. 2: 114b Dutch Civil Code . This means that if a shareholder wants to dismiss/replace board directors following a take-over or a change of control, the sitting board may declare a 250 day waiting period, in order for the board to deeply reflect and consult stakeholders on whether it is a good idea/in the best interest of the company to indeed allow a shareholder resolution at a general meeting with an aim to changing the composition of the board.

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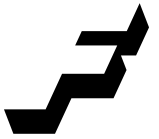

Appeal, the Netherlands have a unique, very hands-on[17] court specialized in dealing with governance conflicts in companies large and small, and since 2019 the Netherlands Commercial Court[18] is available to deal with cases in English[19]. Amsterdam has, together with Paris, been the main beneficiary of Brexit in financial services and equity trading: much equity trading migrated from London to Amsterdam -the European head office of the Euronext group- and Amsterdam attracted quite a few fintechs -it even had the doubtful honor of being one of the few European bourses to see the creation of a few SPACs. In addition, until recently the Dutch tax system enabled tax economies for multinational groups, some of whom had only tenuous links to the Netherlands even though the holding company or an "internal bank"-subsidiary were incorporated there. The whole eco-system is served well by the "Zuid-As"[20] law firms -who handily count business-oriented notaries among their partners[21]- and business consultancies. The whole package is also marketed very well: I have on more than one occasion heard non-Dutch academics issue statements that greatly overestimated the flexibility offered by the Dutch corporate law system, neglecting for instance the role of listing rules or the meddlesome nature of Dutch courts -one additional feature of Dutch corporate law is that tort claims against directors but also shareholders, while rare in absolute numbers, probably play a more significant role in steering corporate behaviour than in other major western European jurisdictions.

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[17] Both in the sense that it acts fast and is not afraid at all to intervene deeply into the way companies are run. There is nothing like a Delaware -inspired business judgment rule in the jurisprudence of the Enterprise Chamber, even though the court pays lip service to the need to avoid hindsight bias. The main avenues for interventions by the Enterprise Chamber in company affairs are, first, the "Enquiry Procedure" ("enquêterecht") which allows the court to appoint experts to investigate company affairs and, when it finds indications of "mismanagement" (a very broad concept) to choose from a wide array of court-imposed measures, including the dismissal or suspension of directors; these days, the court usually intervenes before a finding of mismanagement has been made, based on its broad powers to enact "provisional measures". The second avenue enabling judicial interventions in company management is art. 2:8 Dutch Civil Code, which allows courts to intervene in companies on the basis of "reasonableness and fairness", including ordering the disapplication of mandatory statutory rules because their application in the specific circumstances would be "unreasonable" in the eyes of the court.

[18] https://www.rechtspraak.nl/English/NCC/Pages/default.aspx.

[19] An attempt by minister Geens to create a similar Brussels Commercial Court, failed (mainly as a result of resistance from within the Judiciary).

[20] "Southern Axis", indicating an area in the south of Amsterdam where most major law and consulting firms are concentrated.

[21] In the many continental European countries that have notaries and have enshrined in statute the need for notaries to (mandatorily) intervene in certain transactions -in the Netherlands this includes the transfer of registered shares- such notaries may usually not form a professional association with other professions such as attorneys (members of the bar) or accountants. In the Netherlands there is no such ban on associations of notaries with law firms.

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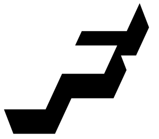

Koen Geens, the Belgian minister of Justice who was the driving force behind the creation of the BCCA, had always been enthusiastic about Dutch corporate law and, as the founder of a successful Belgian law firm, had an affinity with the needs of the Belgian advisory services professions, who would want to emulate the success of their Dutch colleagues. Part of the drive for the reform of Belgian private company law, and the reason why the minister insisted on giving the Belgian private company the same acronym -BV- as the successful Dutch company, was the hope to turn Belgian company law into an export product, able to compete with Dutch "products". This hope turned out, predictably, to be vain: as I just sketched, the Netherlands have a whole ecosystem, of which the flexible Dutch BV is only one relatively insignificant part, and the minister could not create a similar eco-system in Belgium.

2. *The impact of the ECJ cases on freedom of establishment*

Nevertheless, it is important to note that part of the political ambition of the reform was to make Belgian corporate law a player in the light vehicle competition that took off in Europe after the ECJ's *Centros*[22] and *Überseering* judgements.[23] It has been rightly pointed out that the corporate mobility created as a result of these judgements was a brief "flash in the pan"[24]: tens of thousands of continental entrepreneurs, the vast majority from Germany and the Netherlands but still from all over Europe, preferred to set up a UK ltd. rather than choosing a domestic private company form, but with (virtually) all activities concentrated in the country of domicile of the founders. This was indeed a brief phenomenon, because people had often been misguided, not realizing the accounting and tax difficulties they got themselves into, not aware that putting your corporate domicile abroad does not automatically also change the applicable tax and insolvency rules (including on directors' liability) and not having anticipated the hostility of many banks towards funding the activities of such "quasi-foreign corporations".[25] But at the same time it is undeniable that one long term effect of *Centros* and its progeny was that legislators in many European jurisdictions felt obliged to reform their law

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[22] ECJ 9 March 1999, nr. C-212/97, ECLI:EU:C:1999:126, Centros.

[23] ECJ 5 November 2002, nr. C-208/00, ECLI:EU:C:2002:632, Überseering.

[24] W-G. RINGE, "Corporate Mobility in the European Union - A Flash in the Pan - An Empirical Study on the Success of Lawmaking and Regulatory Competition," *ECFR* 2013, 230-267.

[25] About all these elements from a Belgian perspective, see V. SIMONART, « L'application du droit belge aux sociétés constituées dans un autre Etat de la Communauté et, en particulier, aux Limited», *RPS* 2008, 111-206.

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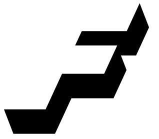

of private companies in order to abolish minimum capital requirements, or lower minimum capital figures to even more symbolic amounts than before.[26]

3. *The switch to the incorporation theory*

A first concrete law change that must be seen in the light of the desire of Belgium to take part in the European light vehicle competition, that is to keep or make its company law attractive to both domestic and foreign entrepreneurs, was the switch to the incorporation theory.[27] Belgian courts had always applied the real seat doctrine under which the location of the registered office creates a mere rebuttable presumption that a company is governed, as far as company law is concerned, by the laws of the country where it is registered.[28] Belgium had never applied a "hard" version of the real seat doctrine- as Germany had when it still applied the real seat doctrine to companies registered in other EU member states,[29,30] until the ECJ in *Überseering* declared that version of the real seat doctrine incompatible with freedom of establishment[31]. In other words, Belgian courts had never denied the legal capacity of a company lawfully set up in accordance with the laws of another member state (or even non-EU country) simply because it had its head office in Belgium and its registered office abroad.

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[26] This happened in at least Belgium, France, Spain, Portugal, the Netherlands and to a certain extent Italy, Greece and Germany (the latter introduced the "Unternehmergesellschaft" as a GmbH with lower capital requirements), see the overview in e.g. H. FLEISCHER, "Internationale Trends und Reformen im Recht der geschlossenen Kapitalgesellschaft", *NZG* 2014, 1086.

[27] For an extensive discussion of the background to, and the implications of this switch, see H. DE WULF and K. MARESCEAU, "Het nieuwe vennootschapsrechtelijke IPR en de procedure tot grensoverschrijdende omzetting: duiding en kanttekeningen" in DE WULF/WYCKAERT (eds.), *Het WVV doorgelicht*, Antwerp, Intersentia, 2021, 701-736.

[28] For a discussion of how the real seat (*siège réel*) doctrine was applied in Belgium, see e.g. J. ERAUW, *Handboek Belgisch internationaal privaatrecht*, Mechelen, Kluwer, 2006, 341-352 and R. JAFFERALI, " Article 111 -domaine du droit applicable à la personne morale" in J. ERAUW et al. (eds.) *Het Wetboek internationaal privaatrecht becommentarieerd*, Antwerp, Intersentia, 2006, 579-583.

[29] See e.g. BGH 1 July 2002, BGHZ 151, 204. After the ECJ's Überseering" decision, the BGH switched to the incorporation theory for companies incorporated in another EU member state: BGH 14 March 2005, *ZIP* 2005, 805 (as did the Austrian Supreme Court, see OGH 15 July 1999, *GesRZ* 1999, 248). But for companies from outside the EU, Germany maintains a "hard" version of the real seat doctrine, see the *Trabrennbahn* judgement (concerning a Swiss company, so not an exotic bird): BGH 27 October 2008, *BGHZ* 178, 192.

[30] For an overview of how the incorporation and real seat theory are applied in various European countries, see the country reports in C. GERNER-BEUERLE, F. MUCCIARELLI, E. SCHUSTER en M. SIEMS, *The Private International Law of Companies in Europe*, Oxford, Beck-Hart-Nomos, 2019, 769 p.

[31] ECJ 5 November 2002, nr. C-208/00, ECLI:EU:C:2002:632 (Überseering).

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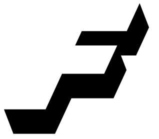

Belgian courts simply accepted jurisdiction when a third party, usually a creditor, claimed the head office of a company was in Belgium, and demanded that such companies made sure their articles of association were in conformity with Belgian company law -if they weren't, they would be disapplied or the other sanctions -never amounting to nullity of the company though- for violations of the mandatory parts of the Belgian companies act would be applied. But while the ECJ's case law on companies' freedom of establishment never ruled this "soft version" of the real seat doctrine incompatible with the Treaties, its case law nevertheless created the impression that, when asked, the ECJ would very rarely accept that the application of domestic company law to a company registered in another EU member state, would pass the proportionality test (Cassis de Dijon-test). Belgian policymakers were therefore convinced it was futile to cling to the real seat doctrine.[32] At the same time, they considered it would not be good policy to copy the German approach, which at present means applying the incorporation theory to companies registered in another EU member state, and the real seat doctrine to companies from outside the EU.[33] Belgium has always been liberal in recognizing foreign companies and allowing cross-border immigration and emigration of companies without interruption of legal personality, long before the EU forced member states to allow those transactions between EU countries. Policymakers now, in the interest of legal certainty and to make it easy for entrepreneurs from all over the world to opt into Belgian company law if they found it attractive, decided to apply the incorporation theory in a universal way.

The Act of 23 March 2019 introducing the BCCA amended the Belgian Code on Private International Law to that effect, codifying the incorporation theory[34]. It also introduced, for the first time, statutory rules on cross-border immigration and emigration.[35] As mentioned, Belgium's highest civil and administrative courts had ruled in the 1960s that immigration into Belgium was possible without a break in legal personality[36], as long as the country of origin of a company allowed this, and in the 1980s[37] had ruled that emigration was also possible. But especially for emigration, the procedure to lawfully transfer not merely the head office (which often is enough to change a company's tax domicile) but also the registered office, was disputed. Some scholars and practitioners suggested emigration required unanimous shareholder approval, which in many companies could never be obtained. The new Act therefore provides that an 80% majority at the general meeting vote is sufficient.[38] Dissenting shareholder were not provided with an exit right, because it was feared this would allow

[32] See the explanation in the Explanatory Memorandum to the BCCA (footnote 1), p. 342.

[33] See *supra* footnote 28.

[34] Article 110 Belgian Code on Private International Law

[35] Arts. 14:15 through 14:30 BCCA.

[36] Cass. 12 November 1965, *RW* 1965-66, 911 ("Lamot").

[37] RvS (=Council of State, highest administrative court) 29 June 1987, nr. 28267 ("Transport Vanneste").

[38] Art. 14:24 BCCA.

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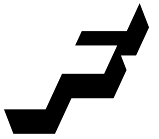

minority shareholder to hijack the company, in making the emigration prohibitively expensive for a company that would have to buy out the dissenters. Also, it would make the outcome of a proposed emigration process highly uncertain, and this in an environment where emigration is often part of a tax planning exercise. Of course, Belgium has in the meantime had to introduce such an exit right to dissenting shareholders as a result of the implementation of the EU's cross-border conversions Directive[39]. I have never met Belgian corporate counsel who are happy about this EU-imposed exit right.

When the introduction of the incorporation theory was first suggested, this met little resistance. Still, labour unions and some socialist (=social-democrat) members of parliament expressed (limited) concerns. The labour unions did not worry about a flight from worker co-determination, since Belgium has no such system and in fact the governance rights of labour within private firms are rather weak in Belgium compared to many other continental European countries. Rather, unions and some politicians worried that the switch to the incorporation theory would make the use of shell companies ("letterbox companies") - companies with only a registered office outside Belgium but most of their activities concentrated in Belgium -easier[40] and that this would be detrimental to corporate creditors, especially the tax and social security authorities, and would allow such companies to escape from all kinds of social and labour-protective Belgian regulation. These fears seemed largely ill-founded, for several reasons. As a rule, Belgian insolvency law and tax law would remain applicable to companies with a head office in Belgium and irrespective of where the registered office is located. Activities, such as environmental pollution or simply employing people, are mostly governed by the paternalistic regulation of the country where those activities are performed.Belgian and international rules on the service of civil procedure documents make it relatively easy to serve notices etc. to foreign registered offices but also to local (e.g. Belgian) offices where assets or people professionally reside, as well as to seize locally present assets.

Nevertheless, in order to alleviate those worries, at least two measures were taken. First, the Code of Private International Law was amended to introduce a rule that Belgian courts would always have jurisdiction over disputes concerning the liability of directors of companies incorporated outside the EU but whose head office is found in Belgium and who at the same time have little economic activity in the country where they are incorporated.[41] Secondly,

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[39] Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions *OJ L 321,* 12.12.2019, p. 1–44.

[40] For a recent defense of the real seat theory, partly based on the enabling role the incorporation theory plays for the abuse of shell companies, see H. EIDENMÜLLER, "Shell shock: in defense of the 'real seat theory' in international company law", https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/03/shell-shock-defence-real-seat-theory-international-company-law.

[41] See art. 109 (Belgian) Code on PIL, as amended by art. 13 of the Act of 23 March 2019 introducing the BCCA (fn. 1). Please note that statute only deals with jurisdiction. The provision does not state that

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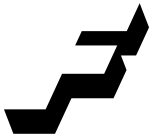

Belgian case law on wrongful trading was codified in a new Insolvency Act[42], and the rule, introduced in 1978, that directors who through their gross negligence contribute to a company's insolvency, can be held personally liable for all the company's debts – a rule which is regularly applied in insolvency- was moved from the Companies Act to the Insolvency Act[43]. Both moves were intended to take away any doubts that these are insolvency law matters, thus governed by the *lex concursus* which is provided by the country where the COMI is located[44]. In other words, the signal was that these are matters to which the *Kornhaas*-approach should be applied.[45] Both moves were also mainly symbolic, since in Belgium it had never been disputed that these matters belonged to the realm of insolvency law[46], and for an attribution to the domain of the *lex concursus* rather than the *les societatis* it does not matter at all whether a statutory rule is enshrined in the Companies or in the Insolvency Act.[47]

II. No debate about corporate purpose; more control than before on the "social enterprise" label

Belgian substantive law on directors' duties or liability will always apply, and does not (formally) influence the determination of applicable law (even though it is well-known that judges are often tempted to apply their own law rather than foreign law even when the latter is clearly indicated by applicable rules on conflicts of laws).

[42] That is "book XX" of the "WER", the Code of Economic Law which codifies most Belgian business law and economic regulation (competition law, consumer protection, …), except company law. Art. XX. 227 WER is the provision on wrongful trading.

[43] Article XX.225 WER.

[44] For the EU, see art. 3.1 of the European Insolvency Regulation (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings).

[45] ECJ 10 December 2015, nr. C-594/14, ECLI:EU:C:2015:806, *Kornhaas*. See also H. DE WULF, "Kornhaas: verduidelijking over de interferentie van de vrijheid van vestiging voor vennootschappen met insolventierechtelijke bestuurdersaansprakelijkheidsregelen", *RDC-TBH* 2016, 435-448; A. VAN HOE, "Hof van Justitie van de Europese Unie, 10 december 2015", *TRV-RPS* 2016, 589-600 and A. SCHALL, "The Forthcoming ECJ Decision of the Kornhaas Case (C-594-14) - the Final Chapter of the European Traveller's Tales," *ECFR* 2015, 280-298.

[46] For a discussion with references to Belgian case law and scholarship, see H. DE WULF and L. VAN DEN STEEN, "Enkele IPR-problemen uit het economisch recht: het mogelijke conflict tussen lex concursus en de lex societatis, de effecten op rekening, en Europees getinte class actions in de VS" in J. Erauw & P. Taelman (Eds.), *Nieuw internationaal privaatrecht : meer Europees, meer globaal*, Mechelen: Kluwer, 2009, 391-485.

[47] ECJ 10 December 2015, nr. C-594/14, ECLI:EU:C:2015:806, *Kornhaas*.

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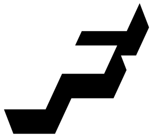

The reform effort that led to the BCCA did not pay attention to ESG issues nor to the "corporate purpose" discussion[48], which only gained world-wide attention from 2018 onwards. This was because the reform was focused on unlisted companies, reformers knew impulses in this area would come from the EU and, importantly, were convinced much of these issues had to be left to comply or explain recommendations in the Belgian Corporate Governance Code (that was being revised from 2018 onwards, which would lead to a new 2020 Code)[49] or, above all, dialogue between companies and their stakeholders, and were unsuitable for (mandatory) regulation in statute.

1. *Companies are for profit, but may also pursue other purposes*

In Belgium, statute has always made clear that companies as legal forms may only be used for the pursuit of profit[50] and, crucially, distribution of those profits among shareholders (if not through dividends or share buybacks, then at the very latest when the company is dissolved, when shareholders share in the liquidation surplus) and this remains a hallmark of the definition of "company" in art. 1:1 BCCA. Nevertheless, a socialist (i.e. opposition) member of parliament[51] and member of the parliamentary committee in which the first draft of the new Code was discussed insisted on a partially new definition of "company" in the very first article of the BCCA, expressing the idea that companies should not exclusively be geared towards profit maximization, or that at the very least the traditional Belgian conception that companies could only be used for the pursuit of profit for the shareholders, was outdated. Late in the political process of getting the draft BCCA approved in parliament, minister Geens made a small concession by giving his support to an amendment suggested by the aforementioned member of the opposition. This amendment did indeed change the definition of "company"

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[48] The literature on this topic has become too extensive to cite. A rich critical summary of the first phase (2018-2020) of the purpose debate, with references to all the major contributions in English at the time, is G. FERRARINI, "Redefining corporate purpose: sustainability as a game changer" in D. Busch, G. Ferrarini & S. Grünewald (eds.), *Sustainable Finance in Europe*, Palgrave Macmillan 2021, 85-150. For one of the latest important additions, see P. DAVIES, "Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements" (November 1, 2022), available at https://ssrn.com/abstract=4285770 and the ensuing debate between him and the "father" of purpose, Colin Mayer, on the Oxford Business Law blog.

[49] For the text in English, see https://corporategovernancecommittee.be/en/about-2020-code/.

[50] To be perfectly clear, in Belgium, contrary to what is the case in many other European countries like Germany or the UK, companies cannot be used for non-profit activities and a clause in the articles excluding profit distributions would be unlawful, though it is lawful to provide that no dividends will be paid as long as the company is a going concern and profits (if any) will only be distributed upon liquidation.

[51] The hon. Member M. Davagle.

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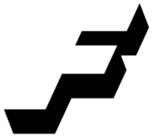

under Belgian law: instead of stating that the "goal" -here used in the sense of "purpose"-of every company must be to pursue profits with a view to distributing those profits among shareholders, art. 1:1 BCCA now states that "one of the goals" of any company must be to pursue profit distributions, thus acknowledging that in addition to the pursuit of profits, companies may also pursue other ultimate goals or purposes. The same idea is also expressed in art. 2:8 § 2 °11 BCCA which more explicitly states that in addition to the always required profit motive, companies may also pursue another purpose. The BCCA thus, arguably, unwittingly prefigured the purpose debate that was then still just behind the horizon. My prediction is that the main practical effect of this "multiple purposes" clause will be to make it more difficult for the company (through a resolution of the general meeting) to challenge decisions by the board that under the old legislation could have been regarded as unlawful (and therefore voidable) gifts (in the sense of acts for which the company gets nothing in exchange and that therefore cannot contribute to profits).[52]

2. *"social enterprises" need a government permit if they want that label*

On a related note, Belgian legislation had since 1995 provided for the possibility for every company type[53] to adopt a "social purpose" and call itself a "social company", provided it adopted 10 features in its articles of association, including the requirement to distribute less than 5% of annual profits to shareholders, but reinvest the vast majority of profits in the stated "social purpose".[54] In the Belgian taxonomy of organizational law, this "social company" was

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[52] Under the old companies act, it was assumed by lawyers and courts alike that since the mandatory and exclusive purpose of any company was to pursue profits and their distribution among shareholders, companies did not have the legal capacity to perform gifts (e.g. philanthropy for good causes, except when it could be credibly argued that the gift was in fact a sort of sponsoring, i.e. good publicity for the company which, through the positive effect on the public image of the company, could indirectly contribute to its profitability). This principle had been used in court cases to declare null and void certain cases where a subsidiary had provided collateral for credit facilities exclusively benefiting other companies belonging to the corporate group and not also itself, or discretionary "pensions" awarded by the board to former directors or executives without a contractual basis and when it was not clear that this pension could be regarded as a delayed payment for services rendered. See e.g. Cass. 9 March 2000, *TBH-RDC* 2000, 782, ann. CH.-A. LEUNEN (Nullity of guarantee given by a (subsequently bankrupt) parent company to a bank covering a credit facility for the benefit of a subsidiary, considered by the court to be an unlawful gift of the parent since it was unclear the parent could at that stage derive any benefit from the guarantee).

[53] Except for the now abolished "agricultural company".

[54] About the old "social company regime", see for instance : P. ERNST, "De vennootschap met een sociaal oogmerk", in: H. Braeckmans and E. Wymeersch (eds.), *Het gewijzigde vennootschapsrecht 1995*, Antwerpen, Maklu, 1996, 37-70; M. BOSSCHAERT, D. COECKELBERGH, L. JACOBS, *Praktijkboek. De vennootschap met sociaal oogmerk. Twee decennia vso, theorie en praktijk (1995-2015)*, Mechelen, Wolters Kluwer Belgium, 2016, 420 p.

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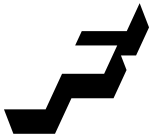

a strange hybrid between a non-profit association (these may not distribute profits at all) and a company (which to this day must always pursue profits, the company legal form is not available in Belgium for organizations that are not geared towards distributing at least some of their profits). As a cartesian-minded academic, Koen Geens did not like this neither fish nor fowl creature. More importantly, the social company was not a success: only about 800 companies (out of more than 400.000 companies in Belgium) adopted the social company status. The BCCA reform did not abolish the social company, but reformed it. The label "social company" was replaced with "social enterprise". Only cooperative companies were allowed to apply for this label. The initial draft would have allowed both cooperatives and non-profit associations to apply for the label, but after a lobbyist representing the non-profit sector had written a letter to the ministry expressing the feeling that non-profits felt insulted because they allegedly were all animated by a social purpose[55], it was felt it would be best to restrict the possibility to be recognised as a social enterprise to cooperative companies. The major change compared to the old companies legislation is that companies can no longer award the label to themselves: they must submit their articles of incorporation to the ministry of economic affairs, where a civil servant will check whether they are worthy of the recognition as social enterprise and if they are, hand out a permit to that effect.[56] As mentioned before, social enterprises may only distribute less than 5% of their profits and when they are dissolved, any retained earnings (reserves) may not be distributed among shareholders, but must be transferred to either another "social enterprise" or to a non-profit association or foundation.

There is a weak spot in these rules[57]: according to majority opinion among lawyers (untested in court), nothing prevents a social enterprise from handing back to the ministry its recognition as a social enterprise, and this is a discretionary decision on the part of the company which does not need to be accepted or approved by the ministry. Since immediately after this, the company is no longer a social enterprise, it would be permitted to distribute all its retained earnings to shareholders. A well-known example of this occurred last year: 30 years ago, most first division ("premier league") Belgian football clubs were organized as non-profit associations. In the 1990s and early 2000s, most became public companies (NVs), but some in addition adopted the "social company" label. All companies that before 2019 had been social companies, were automatically recognized as social enterprises under the BCCA.[58] One

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[55] A laughable assertion, saying more about the self-image of the sector than about outside reality.

[56] See art. 8: 5 BCCA.

[57] About some loopholes in the asset-lock system for non-profits in Belgium generally, see S. COOLS and M. VERHEYDEN, "Doelwijzigingen en omzettingen die het doel wijzigen: meerderheidsvereisten en vermogensbescherming", *TRV-RPS* 2022, 357.

[58] Art. 42 § 1 of the Act of 23 March 2019 introducing the BCCA (fn. 1).

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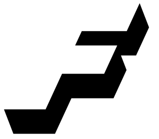

football club last year (2022) handed back its "social permit", clearly with a view to distributing its reserves among its shareholders. This ought not to be possible.[59]

III. How many company forms do you need?[60]

1. From 12 to 6 varieties of company

Koen Geens was intent on reducing the number of different company forms available. Under the old legislation there were 14, if one included the two European company forms.[61] The BCCA does indeed contain fewer company forms, essentially 6 Belgian ones (plus the SE and European cooperative company): the unincorporated partnership[62], the incorporated partnership[63], the limited partnership[64], the private company (BV-SRL)[65], the public company (NV-SA)[66] and the cooperative company (CV-SC)[67].

I have argued elsewhere[68] that any decent legal system needs to provide four company types: 1. an unincorporated partnership, which essentially serves the function of a very flexible and

[59] Marieke Wyckaert and myself are currently drafting a "repair act" (as these are called in Belgium) with the intention, if parliament approves, of plugging this loophole in the asset lock system for social enterprises.

[60] On this question in the context of the Belgian company law reform, see also, briefly, S. COOLS, "Editoriaal. Waarom hebben we vennootschapsvormen?" *TRV-RPS* 2020, 497-498.

[61] The SE and the European Cooperative Company; the EU also provides for a European Economic Interest Grouping, but this is not a company; Belgium did, however, have a Belgian Economic Interest Grouping, which did have the status of company (and which could be set up with only Belgian partners, or could have non-EU firms as shareholders, contrary to a European EIG); this was abolished on the occasion of the introduction of the BCCA.

[62] In Dutch and French: maatschap, société de droit civil (no acronym exists).

[63] VOF/SNC= vennootschap onder firma, société en nom collectif.

[64] Comm.V/Scomm.= gewone commanditaire vennootschap, société en commandite.

[65] Besloten vennotschap, société à responsabilité limitée.

[66] Naamloze vennotschap, société anonyme.

[67] Coöperatieve vennootschap, société cooperative.

[68] H. DE WULF, "Zijn de blijvende verschillen tussen NV en BV gerechtvaardigd ?", *TRV-RPS* 2022, nr. 3, 135-144.

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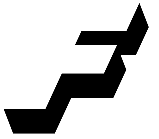

discreet[69] asset management structure -including for joint ventures between corporations. Since the 19th century, French and Belgian scholars agreed that in spite of the lack of legal capacity and legal personality of the unincorporated partnership, the assets contributed to this partnership could not be seized by the creditors of an individual partner, with a view to safeguarding the continuity of the partnership. But at least in Belgium, this quasi-unanimous opinion in legal scholarship was not shared by attorneys acting on behalf of such individual creditors, and the principle had not been confirmed in a leading court case. The BCCA ended the controversy by simply writing the principle into statute[70] and shortly thereafter an amendment to the Belgian Civil Code introduced the equivalent of what in Germany is called the *Gesamthand* into Belgian property law, meaning a form of collective ownership where the co-owners have no right (claim) to the individual assets composing a collection of assets to which their collective ownership pertains.[71] Under such a system, since the co-owners themselves have no rights to individual assets, their creditors cannot demand the liquidation of the estate (collection of assets) let alone directly seize such assets. Everybody (in Belgium) now agrees that the assets of an unincorporated partnerships should be considered such a *Gesamthandi*[72] 2. An incorporated partnership, in the sense of a legal entity with legal personality and hence legal capacity but unlimited liability of the partners for the company's debt, because their personal creditworthiness -both financial and moral-reputational- is central and they enjoy great flexibility in arranging the company as they see fit, with very few mandatory governance rules, very little disclosure, and very little expensive formalities (such as notarial deeds for incorporation) imposed on the entity; 3. A private company, the governance of which can largely be left to contractual arrangements in the articles of association 4. A public company, which needs more mandatory law, also concerning the governance arrangements, since such a company would, in a system that provides for a properly designed private company, only be used for capital-intensive companies with numerous shareholders who are at a greater distance to management and most of whom -except the usually present coalition of controlling shareholders- cannot realistically or cost-effectively bargain for mechanisms that protect their interests.

When the reform which would lead to the BCCA was being prepared, everybody agreed that the three varieties of unincorporated partnership under the old legislation could be reduced to one type, and that is what happened. Everybody also agreed that the private company should be turned into the default corporate form. There consensus stopped.

[69] No need to register the entity let alone disclose the identity of the partners.

[70] See arts. 4:13-4:15 BCCA.

[71] See art. 3.68, second paragraph of the (new) Belgian Civil Code.

[72] See H. DE WULF "De maatschap: *Catch me if you can*. Hoe rechtstheorie legitimeert maar niet fundeert" IN S. COOLS (ed.), *Lessen na twee jaar WVV*, Roeselare, Roularta, 2022.

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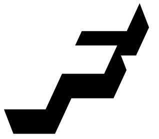

2. *Does one really need public companies (NV-SA) except for listed entities ?*

Koen Geens initially wanted to abolish the cooperative company (see *infra*, next section) and wanted to introduce a mandatory rule that the public company form could only be used by companies above a certain size (based on turnover, total assets, employees). Most people and interest groups thought the last idea was ill-advised, if only because it would be hard to sensibly set a size threshold and companies would fluctuate in size, zigzagging above and below the threshold, but also because Belgium had more than 90.000 often small or medium-sized public companies[73], and entrepreneurs and shareholders hated the idea they would have to transform their NV-vehicle into a BV simply because the minister wanted a more simple and beautiful company taxonomy. So it was soon decided to keep the NV for all who found the form amenable to their purposes. The main difference between NV and BV after the reform, which allowed BVs to make their shares freely transferable and even to list their shares[74], is that the private company has no legal capital whereas the public company is subject to all EU company law directives, including the rules on capital formation and maintenance. Other differences are that only NVs can choose a two tier board model, and that in NVs there is no requirement for directors to perform a formal solvency test when paying a dividend. I believe these differences are unjustified. Even though there will be even less demand for two tier structures in BVs than in NVs, if one wants to turn the BV into the all-round default company, it should have at least as many governance structuring options as the NV. Conversely, the need for creditor protection is the same in NVs as in BVs and therefore it cannot be justified to impose a formal solvency test on the directors of one but not the other type of entity, who can both operate with exactly the same type of underlying firm and capital structure. I lost this debate within the expert group that drafted the BCCA; my colleagues felt that in a reform that intended to create maximum flexibility and wanted to alleviate administrative burdens on companies, it could not be justified to impose a new requirement

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[73] The explanation for this high number was tax. Only public companies were allowed to issue bearer shares, until these were outlawed in 2008 (see art. 3, §1 Law of 14 December 2005 abolishing bearer securities, *BS* 12 December 2005). Bearer shares not only offer unanimity, importantly they could be donated (to e.g. children) without paying gift taxes, whereas registered shares (the only type of shares available in all other companies) can only be lawfully gifted through a notarial deed, which gives rise to a levy of the gift tax by the notary. After the abolition of bearer shares in 2008, far fewer NVs were set up and the total number declined from more than 110.000 to about 90.000 on the eve of the 2019 reform. Still, it would have caused outrage if most of these- being smallish firms- would have been forced to transform themselves into BVs, even though the tax difference between the two company types had in the meantime also disappeared because of the outlawing of bearer shares, and the 2019 reform allowing "dematerialised shares" (uniquely, in Belgium these are a separate category of shares; bearer shares cannot be dematerialised and vice versa. In Belgium the three categories are bearer shares (now abolished), registered shares, dematerialized shares and these are mutally exclusive) in BVs as well as in NVs (where they had been made possible in 1995; in reality, only listed companies normally use dematerialised shares, because of the costs charged by the banks for the required securities accounts).

[74] But in that case the BV will have to mandatorily copy many of the governance arrangements of a NV, see art. 5:2 BCCA.

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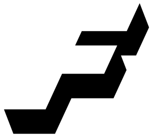

on public companies (NVs) that are still subject to the capital-based creditor protection rules from the EU directive. Private equity practitioners have let it be known that the fact there is no solvency test in the NV is a reason for them to prefer NVs over BVs in acquisition structures.

3. *The cooperative company: a strange beast with friends in high places*

Some important Belgian firms, including several of the best politically connected ones (because they originated in either the Christian-Democrat or Socialist political families) are cooperative companies, and it was therefore unlikely from the start that Koen Geens's idea of abolishing the cooperative would find traction. But even the better idea of only allowing entities that truly conformed to cooperative ideas to adopt the cooperative company form and requiring the vetting of this issue by a government agency that would recognize firms as cooperative (in other words, a permit system) was unacceptable to the influential cooperative world. In Belgium, cooperative companies that so wish have since the 1950s had the possibility to have themselves recognized as "recognized cooperatives" by a quasi-government agency.[75] This (also today, after the reform) bestows important tax advantages upon them[76], in exchange for the duty to reinvest most profits rather than distributing them as dividends, and the need to allow employees to become shareholders. But since the minister did not want, as had happened in the past, just anyone who so wished to set up a cooperative company instead of a BV, the BCCA enshrined a compromise: only companies that conform to the definition of a "true cooperative" in art. 6:1 BCCA can adopt the cooperative form. Among this group, those who so wish can apply for the additional label (plus tax advantages) of "recognized cooperative". But since the definition in art. 6:1 BCCA, even though inspired by the International Cooperative Alliance Principles[77], is hopelessly muddled and vague[78], and there is no *ex ante* control on the true cooperative nature of a company, its main practical effect has been that "liberal professions"- firms like lawyers, accountants, doctors, architects or other consultants can no longer adopt the cooperative form. Before the reform, most firms of lawyers or accountants in Belgium, including the Belgian branches of the Big Four auditing firms, were cooperative companies. For what were economically speaking limited liability partnerships (but in the legal form of a cooperative), the cooperative company form was attractive because

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[75] This system was maintained under the BCCA, see art. 8:4 BCCA. This means in addition to "regular" cooperatives, there are also "recognized cooperatives" (as well as cooperatives and recognized cooperatives recognized as social enterprises" -acronym: "CVSO").

[76] They are taxed at a rate comparable to the rate for non-profit organisations, where tax rates are much lower than for corporations.

[77] See https://www.ica.coop/en/cooperatives/cooperative-identity.

[78] See the analysis of the possible interpretations of art. 6:1 BCCA and criticism of its vacuous nature in e.g. E. CALLENS, L. DEMEULEMEESTER and H. DE WULF, "Het nieuwe wettelijke kader voor de coöperatieve vennootschap" in H. DE WULF and M. WYCKAERT (eds). *Het WVV doorgelicht*, 2021, at 493-506.

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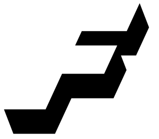

(apart from the fact that until 1991 and 1995 reforms, legal capital requirements could easily be circumvented even though the shareholders enjoyed limited liability) the cooperative was the only company that could issue redeemable shares, allowing for the flexible entry of new partners to e.g. the law firm, and more importantly, their easy exit, paid out of company funds, so that the exiting partner did not have to find an external buyer for his shares nor needed to be bought out directly by the other partners. As part of the BCCA reform of the BV, which has of needs become the new company of choice for the professions, BVs for the first time were given the option of making their shares redeemable,[79] and also to exclude shareholders (namely partners in e.g. the law firm), something which is also not really possible (at least not at the initiative of the company itself[80]) in the NV. Both exit (voluntary redemption of shares) and exclusion (involuntary redemption) have always been, and remain, possible in cooperative companies[81]. In any case, most large professional service firms in Belgium have by now switched from being cooperatives to the form of a private company (BV). Those that have not gone through the transformation voluntarily, will become BVs by force of law on January 1 2024[82]; if someone, like a competitor or the district attorney, can convince a judge that they do not conform to the definition of "true cooperative", a court can also forcibly dissolve them, which is a risk most entities will want to avoid by transforming themselves in time into a BV.

4. *The mistaken abolition of the public partnership limited by shares*

A policy mistake was the abolition, as part of the reform, of what in English could be called the public limited partnership, i.e. the *société en commandite par actions*, the equivalent of the German *Kommanditgesellschaft auf Aktien*. In the 19th century (and probably earlier), this was a precursor to the public company (NV/SA, only introduced in Belgium by a law of 1873) that by the 1980s had become almost extinct, until Belgium was confronted in 1988 with its first major hostile take-over bid, when the Italian Carlo de Benedetti unsuccessfully tried to take over *Société générale de belgique*, a diversified holding company which at the time was said to

[79] Art. 5:154 BCCA. The articles of association need to contain a clause to that effect. In any year where there have been redemptions, the BV's directors need to ask a notary to enact a change to the articles (once a year for all redemptions in that year), indicating the new number of shares in the company. In cooperatives, redemption is a statutory right of shareholders, which the articles can subject to certain conditions but may not exclude, and the board will amend the articles, no notary is required.

[80] There are (very successful in that they are applied very often) statutory rules on "forced exits" of shareholders (the so-called "Geschillenregeling", art. 2:60 ff BCCA) but under those rules it's one shareholder who, through a court proceeding, can ask a court to exclude another shareholder, or force the defendant shareholder to buy the plaintiff's shares, if the plaintiff can invoke "just grounds" and is, in the case of exclusion of the defendant, prepared and able to pay the excluded shareholder the true value of its shares, as determined by the court on the basis of expert reports.

[81] See art. 6:120-6:123 BCCA.

[82] See art. 41 of the Act of 23 March 2019 (fn. 1)

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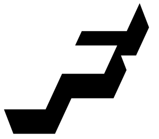

control about 30% of Belgian industry.[83] This event, shocking to the Belgian financial establishment (which engineered a partial sale of the *Générale* to a French conglomerate today called Suez), led advisors to rediscover the possibilities of the *commandite par actions*. In fact, this company type allowed to combine the advantages of a limited liability entity the bearer shares of which could be listed, with a concentration of governance powers in the hands of one shareholder, the managing partner, who needed to hold only one share. Statute awarded this managing partner a veto right to all general meeting decisions affecting the relationship of the company with third parties, which was deemed to include decisions on profit distributions and on the dismissal of the managing partner from his management position.[84] The drawback was that the managing partner was personally liable (mandatorily) for all the company's debt, but the effects of this were easily neutralized by appointing a private company with limited liability as the managing partner.[85] Post de Benedetti, controlling shareholders of several Belgian listed groups cemented their control through the use of a *commandite par actions.* From the 1990s onwards, the *commandite* became a popular vehicle for closed investment funds, including listed real estate investment funds. It was also frequently used, until 2019, in the Belgian private equity industry. Nevertheless, Koen Geens insisted it be abolished, and so it was, as part of his drive to reduce the number of business forms.

But in order to compensate for this abolition, the BCCA now provides that regular public companies (NV-SA) can choose to appoint only one director[86], instead of the collegial board with at least three members that was mandatory under the old rules. If the founders so desire, they can award veto rights at the general meeting similar to those available under the former legislation to this single director, except that the general meeting can always dismiss the director for cause (in other words, he cannot veto his own dismissal for cause) and the law allows shareholders holding 10% of the shares to seize the court to have the managing director dismissed for cause.[87]

I think the abolition of the *commandite par actions* was a policy mistake. It certainly was a strange, hybrid beast within the company zoo, but it harmed nobody and, on the contrary, served a useful purpose as an investment fund vehicle. At the same time, allowing NVs to

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[83] See about this in a wider context the highly interesting contribution by M. BECHT "Belgium: the disappearance of large diversified business groups" in A. M. COLPAN and T. HIKINO (eds.), *Business Groups in the West: Origins, Evolution, and Resilience*, Oxford university Press, 2018, 147-164.

[84] See art. 659 of the old (1999) companies act.

[85] I once had the opportunity to talk to the scion of a billionaire family that controlled a listed holding company through a *commandite* and he told me that his family never bothered to use a legal person as managing partner, because they were convinced that the liability risks of the position at the level of a holding company were negligible in practice, while appointing a natural person (family member) directly as managing partner created transparency to the outside world about who was in charge.

[86] Art. 7:101 § 1 BCCA.

[87] Art. 7:101 § 4 BCCA.

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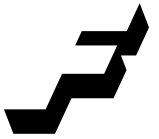

have just a single director who potentially enjoys veto rights, means outsiders who want to invest or otherwise do business with an NV will need to check the articles to find out what the governance structure of the NV is. In the past, the name "commandite par actions" signaled to everybody what kind of animal one was dealing with. True, in one or two notorious cases, the managing partner of a large *commandite* had abused his ironclad position to the detriment of the company, with shareholders unable to remove him. But that problem could have been tackled by, as the BCCA has done, making it possible to dismiss the managing director for cause, also at the initiative of (substantial) minority shareholders.[88]

IV. More flexibility and no goldplating of EU rules please, we want to forget our *dirigiste* past

1. *The very inflexible past of the Belgian private company*

As indicated, a major goal of the reform was to turn the private company (BV-SRL, previously called BVBA-sprl) into the default company, to be adopted by all entrepreneurs, except for listed companies and those using a company vehicle for estate planning purposes, for which partnerships are often more suitable than corporations. In the past many small and medium-sized firms had organized as a public company -mainly for tax reasons – which resulted in Belgium having far more public companies than the far bigger German economy- and the cooperative company was treated as a more flexible alternative to the private company. Also, in the ten years or so before the reform, Belgium had witnessed a boom in the use of partnerships, especially for all manner of consultancy businesses with limited assets and few liability risks, so that founders cared little about the unlimited liability that came with these legal forms. The intention of policymakers was that all this would soon belong to the past, by turning the BV (private company) into a very flexible, *de facto* contractual machine, offering the same flexibility as partnerships but with the benefit of limited liability and the possibility to organize the same capital structure as in a public company.

Until the reform, the statutory rules on private companies in Belgium were very inflexible. The private company had been introduced in 1935, but after that had not really been reformed except through the implementation of EU company law directives. Belgium had systematically applied the European directives that were only applicable to public companies to private companies as well. Thus the rules on legal capital, for example, were virtually the same for private as for public companies, except that minimum capital was lower for private

[88] See now art. 7:101, §4 of the BCCA, for public companies who have opted for a single director instead of a board.

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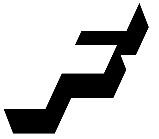

companies[89]. The first systematic effort undertaken by the reform was to roll back all this gold-plating: henceforth only the public company (NV/SA) would remain subject to the rules from EU Directives (because the EU mandated this[90]), not the other companies, especially not the private company (BV). The 1935 private company had been mildly flexible in its management arrangements, but very inflexible as far as shares were concerned: all shares needed to be registered and, far more importantly, all shares needed to have exactly the same voting and profit rights attached to them, except that a 1991 reform had allowed private companies to issue non-voting stock, which very few of them did, mainly because these non-voting shares were subject to mandatory rules allowing them to vote anyway on a whole range of important corporate transactions and entitling them to preferential (higher than voting stock) dividend claims.

2. *Examples of the new flexibility, including multiple voting rights in unlisted companies*

The BCCA reform started from the premise that no statutory rule should be mandatory, unless it could be shown that this was needed to protect the interests of a stakeholder group (or of the public or the state) in situations where these could not realistically[91] or cost-effectively bargain to protect their own interests. Many provisions on private companies in the old legislation failed that test. An effort was also made to systematically indicate through the wording of the BCCA if a statutory provision was mandatory instead of enabling, e.g. by starting the relevant sentence with a phrase like "Notwithstanding any provisions to the contrary in the articles of association, …"[92]. Under the old legislation, some controversies had existed about the enabling or mandatory nature of some statutory rules.

An example of the new flexibility for private companies is that companies are now completely free to determine the voting and financial rights attached to shares. The old mandatory equality of shares (all having the same rights, i.e. one vote and an equal share in profits) has

[89] 18.600 euros of which only 6200 needed to be paid fully paid up from day one, as opposed to 61.000 euros for a public company.

[90] Of course, the rules from what was originally the "First company law directive" applied to all companies with limited liability, not just to public companies, and this remains the case in Belgian law as well. One thinks, for example, of minimum disclosure rules and of the Prokura doctrine (company may not rely against outsiders on limitations in the articles of the statutory powers of company "organs" like the board and general meeting of shareholders).

[91] This could also be because of the limits of the average human's rationality, and propensity to be duped.

[92] As opposed to the phrase that explicitly indicates a provision is enabling/only a default provision: "Except if the articles (or issuing conditions for shares or bonds) provide otherwise, …"

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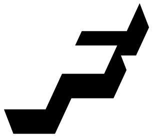

been abandoned for its complete opposite: private companies may, like public companies, issue not only non-voting stock without the need, as in the past, to compensate this with preferential profit rights, but as long as they are not listed[93] may also issue other classes of shares with multiple voting rights.[94] There is no limit to the number of votes attached to shares (no limit to the multiplier), and multiple voting rights can be subject to a sunset clause or , conversely, depend on a condition precedent or certain features of the shareholder who holds them (e.g. certain shares only have 10-fold voting rights as long as they are owned by the founder or her descendants, or if they are held by someone owning at least 10% of the total number of shares). The rules on transferability of shares in private companies have also been turned into default rules.[95] The former mandatory rule -which could not be relaxed in the articles of association- that shares in a private company cannot be transferred (sold, gifted, inherited, …) except if the transfer is approved by half the shareholders who represent at least 2/3rds of the total number of shares or except if the transfer is between close blood relatives or among existing shareholders, has been maintained as the default rule in private companies, but the articles may contain any rule the founders/shareholders may find suitable, including the completely free transfer of shares like in public companies. (In addition, the BCCA ended an old controversy by explicitly stating, both for private and public companies that if shares are sold or transferred in contravention of a limitation to share transfer in the articles- as opposed to a mere shareholder agreement not reflected in the articles of association- such transfer cannot be relied upon against the company, with as a result that the buyer/transferee cannot exercise any shareholder rights vis-à-vis the company)[96]. As a result of lobbying by Euronext, mainly with Belgium's flourishing biotech start-up scene in mind, and also because the Dutch allow this too and Belgium hoped to make its BV as attractive as the Dutch BV, BVs (private companies) can now even list their shares on a regulated market (but then have to copy many of the mandatory governance provisions from the law on public companies, see art. 5:2 BCCA).

For public companies, an example of increased flexibility pertains to management structures. Prior to the reform, every public company mandatorily needed to have a collegiate board consisting of at least three directors[97], who could be dismissed at will with an ordinary majority (50% plus one vote) by the general meeting. The Belgian court of cassation had decided that the latter rule on dismissal was one of "ordre public", meaning any deviation

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[93] In listed companies, double loyalty votes and non-voting stock are allowed, but not multiple voting shares.

[94] Art. 5:42 BCCA, see also arts. 5:48 (on classes of shares) and 5:136 (board may not use "authorized capital" clause to issue multiple voting stock).
[95] Art. 5:63 BCCA.
[96] Articles 5:67, 6:56 and 7:78 BCCA.

[97] If a company only had two shareholders -a public company could previously not be set up by fewer than two shareholders, the BCCA has abolished that rule, see art. 7:1 BCCA- two directors sufficed.

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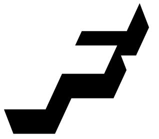

from it in the articles or a (shareholder) agreement was “absolutely null and void”[98]. Under the BCCA, public companies can choose between the traditional one tier board model, a two tier model[99] (supervisory board elected by the general meeting and executive board appointed by the supervisory board; both boards having no members in common) or even for a model with just one director[100] (but if a listed public company appoints only one director, this must be a legal person with a collegiate multi-member board itself[101]). Directors[102] -who in public companies may be appointed for a period of up to six years without the need to be re-elected, although in practice two or three year terms are more common- may now be protected against dismissal at will by the articles of association or their individual contract with the company in public companies too.[103] This could be useful to somewhat protect independent directors from the direct influence of controlling shareholders, although the controlling shareholder will of course still be decisive when every three to six years, the director who wants to maintain his position, needs to get reelected by the general meeting.

However, as mentioned, when reformers thought a mandatory rule was needed to protect stakeholder interests (shareholders being one important stakeholder group), they in a limited number of circumstances not only maintained existing mandatory rules, but created new ones. An example is the new rule that if a director in a corporation (BV, NV, CV) is plagued by a conflict of interest, that director may not participate in board deliberations on the issue (or in decision-making at all if there is no board)[104]. This rule had already been part of Belgium’s first legislation on corporations, in 1873, but had been abolished in 1995, when it was only maintained for directors in listed companies, whereas in any unlisted company, a conflicted director needed to inform his fellow directors of the conflict of interest, but was still allowed after that to take part in the decision-making process. The expert committee drafting the BCCA thought this was an unjustifiably lax rule on conflicts of interests and decided to tighten the screws on conflicted directors.

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[98] Cass. 13 April 1989, *TBH* 1989, 878 and Cass. 22 January 1981, *RCJB* 1981, 495.

[99] For no good reason, private companies are not allowed to choose a two tier board model, not even when they become listed. It was -as such correctly- assumed that here would be little interest in Belgium in two tier systems except in some very large firms, but this discrimination against private companies compared with public ones neglects the fact that private companies are often as large as all but the very largest public companies and runs counter to the reform’s goal of turning the private company in a perfect alternative for the public company in all circumstances. This was, again, a debate I lost in the expert committee that drafted the BCCA.

[100] See arts. 7: 85, 7:101 and 7:104 ff BCCA for the three models.

[101] Art. 7:101 § 1 section 2 BCCA.

[102] In public companies; in private companies this has always been possible.

[103] Art. 7:85 § 3 BCCA.
[104] Arts. 5:76 (BV) and 7:96 (NV) BCCA.

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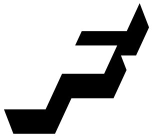

The new legislation also increased a number of disclosure requirements or more precisely instances where the board has to mandatorily inform shareholders in the hope that this will contribute to informed decision-making by the general meeting. The prime example is that it is now mandatory for the board to submit a report to shareholders prior to any general meeting that will be asked to vote on the issuance of new shares.[105] The report needs to explain to shareholders how the offering price was determined and what financial and power balance impact the issuance of the new shares may have on them[106]. Except when (some) contributions are in kind, shareholders may unanimously[107] waive the requirement for a report, but only at the general meeting deciding on the issuance (a clause in the articles, for instance, would be unlawful).

3. *Legal capital is out: the concept, not just the minimum amount*

The first victim of the flexibilization and anti-goldplating exercise was legal capital. Belgium had experimented with a "BV light" that enjoyed lower minimum capital requirements than regular BVs. This had not been a success[108]. Academics had convincingly shown that the European capital maintenance system was ineffective and inefficient in protecting creditors' interests[109], and so the reformers decided that, rather than lowering minimum legal capital to a symbolic amount of 1000 or even 1 euro, it was more straightforward to completely abolish the concept of legal capital for BVs. That was a logical, cartesian decision which I still think was a good decision, though it necessitated some practical adaptations by firms. For instance, annual accounts for private firms now look slightly different than for public firms. The first item on the liabilities side of the balance sheet for private firms is no longer called "legal capital", but "contributed own funds" ("contributed equity" could be an alternative translation, as long as one is aware that this 'equity' does not have the legal or accounting

[105] Art. 5:121 § 1 BCCA.

[106] In the past, such a report was essentially only required in down rounds, in the sense of issuing new shares at a price lower than prior share issues, or if preemption rights of shareholders were curtailed.

[107] Needless to say, this is only obtainable in companies with only a handful of shareholders.

[108] See D. BRULOOT and K. MARESCEAU, "BVBA Starter", *NJW* 2010, 302-313.

[109] For probably the most complete overview of the debate with reform proposals that were the basis of the Belgian reform of the legal capital regime, see the published Ghent University Ph.D. thesis of my former student and now colleague D. BRULOOT, *Vennootschapskapitaal en schuldeisers*, Antwerp, Intersentia, 2014, 824 p. From the abundant international literature, we limit ourselves to referring to L. ENRIQUES and J.R. MACEY, "Creditors versus capital formation: the case against the European legal capital rules", *Cornell Law Review* 2001, 1165-1204; P.O. MÜLBERT and M. BIRKE, "Legal Capital- is there a case against the European legal capital rules ?" *EBOR* 2002, 695-732 and the various contributions in M. LUTTER (ed.) *Legal Capital in Europe*, ECFR Special Volume 1, Berlin, de Gruyter, 2006, 701 p.

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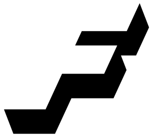

status of 'capital'). These may be distributed (e.g. as dividends), unless the articles of association provide otherwise. Even when the articles provide that a certain amount of equity (or all of it) cannot be distributed, this status can be changed by the general meeting of shareholders with the majority required for changes to the articles (75%). Tax law also needed to be changed[110] to make sure the tax status of " contributed own funds" was the same as former legal capital -so that, as a rule, this equity could be returned to shareholders without this being taxed, since such a distribution is not a distribution of profits- though the tax authorities could only accept this for shares issued against regular contributions in cash or in kind and not for equity representing a contribution of services. Consequently, for tax purposes equity representing contributed services is not treated as legal capital by Belgian tax law, so that in reality hardly any firm books the value of such contributions as assets on the balance sheet, and no corresponding equity is formed on the balance sheet. Art. 46 of the consolidated Company law Directive does not allow public companies to issue shares in exchange for the contribution of services, a rule that Belgium, goldplating as usual, originally applied to private companies as well, but abolished for the BV in the 2019 reform. Because of the (complicated) tax treatment of such contribution of services, almost no companies accept such contributions and investors are not interested in performing such contributions, but get remunerated in other ways for the services they render to the company outside an employment contract.

Since there is no legal capital in a BV, shares do not have a par value (neither nominal value nor accountable par value). One may of course state that every share represents a fraction of the company's equity, but neither in company law nor from an accounting (or tax) perspective does such a statement have any relevance. The rights (voting right, right to share in profits) are not, as is the default rule in public companies, proportionate to the par value of the shares, but the default rule is that each share entitles its holder to exactly the same rights[111]. The articles may, however, deviate from that default rule in almost any way that the drafters of the articles can imagine, as long as this does not amount to robbing a shareholder of any realistic prospect of actually sharing in the company's profits.[112]

4. *But creditor protection through corporate law statutory provisions remains a major goal*

The abolition of legal capital did not imply that creditor protection through company law statutory rules would be abandoned by the Belgian legislator. On the contrary, a commendable

[110] This was done through the Act of 17 March 2019 ("tot aanpassing van bepaalde federale fiscale bepalingen aan het Wetboek van Vennootschappen en Verenigingen"), *BS* 10 May 2019.

[111] Art. 5:42 BCCA. This includes one vote per share and equal profit rights per share.
[112] Ban on "clauses léonines", see art. 4:2 BCCA.

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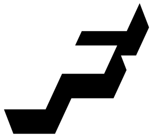

feature of the BCCA is that it reinforces such protection and raises it to a higher level than before the reform.

Belgium maintained, also for the BV, its rather unique rules on the "financial plan" requirement in every limited liability company.[113] This is the requirement that upon formation of such a company, the founders must hand over to the acting notary a sort of business plan in which they estimate the cashflows and the corresponding funding needs of the company in the first two years of activity. The BCCA has reinforced the requirements for such financial plans, thereby also encouraging people to enlist the help of a financial expert in estimating the funding needs of their future company. If the company is declared bankrupt within three years after having been set up, statute provides the insolvency trustee may sue the founders for personal liability of all the company's debts if he can show that the company was manifestly undercapitalized, i.e. underfunded in view of its planned activities.[114] Insolvency trustees only launch such claims in a tiny percentage of company insolvencies, and rumor has it that certain courts (Antwerp) are reluctant to impose such a harsh sanction on good faith founders whose only crime was to be totally unsuitable for business, but every year there are a few cases of founders who are thus held personally liable for the company's debts.[115]

Controversially, the BCCA also maintains the rules on expert valuation of contributions in kind in BVs.[116] Exactly the same rules apply as in public companies (where these rules were harmonized by the 2nd Company Law Directive). That this obligation was maintained was seen as an internal contradiction by many, in light of the abolition of legal capital in the BV. Also, sceptics have been pointing out (though seldom in writing) for about four decades that it is allegedly possible to do some shopping around and find "flexible" auditors who will issue a valuation statement that conforms to the wishes of company founders or contributors. But the reform committee thought that even in an entity without legal capital, it would be useful to try and help protect creditors (and gullible minority shareholders) against overvalued assets/underpriced shares by mandating an independent expert (who under Belgian law must be an auditor) to perform this valuation check. It helped that in Belgium the auditing and accounting profession is an active and influential interest group when business law is reformed.

[113] Article 5:4 (BV) and article 7:3 (NV) BCCA.

[114] Art. 5:16, 2° BCCA.

[115] See the examples cited in C. CLOTTENS, COOLS, S., DE DIER, S., GEENS, K., LE PAIGE, Y., VAN BAELEN, B., VAN EETVELDE, J., WYCKAERT, M., "Overzicht van rechtspraak. Vennootschappen en verenigingen (2012-2019)", *TPR* 2022, p. 1830-1838 (nrs 396-406).

[116] Article 5:7 BCCA. However, the rules on *Nachgründung* were abolished for the BV.

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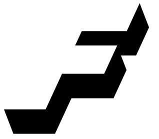

Both in public and in private companies, dividends can only be paid out if these do not exceed the amounts determined in accordance with the balance sheet test as harmonized in art. 56 of the consolidated European Company Law Directive[117]. As readers will know, this test implies that if a company suffered losses in the past, these must first be compensated with current profits before a dividend can be paid out, and Delaware style "nimble dividends" are unlawful. In addition to this traditional balance sheet test, the BCCA introduced a solvency test[118] -called "liquidity test" in Belgian legislation- but only for the private company, to compensate for the lack of legal capital. The solvency test entails a duty for the board to evaluate in a written report whether the actual payment to shareholders of dividends that have been approved by the general meeting, would cause problems for the company to pay its short term debt as it becomes due in the next 12 months or a longer period in the foreseeable future in case the board is in a position to make evaluations for that longer period. In case the board concludes that the dividend payment is a risk, it must stop it from happening. This means the board is entitled- and indeed under a duty- to block dividend payments that have been approved by the general meeting. In other words, any distribution decision by the general meeting is subject to the condition precedent of a "positive" solvency test. The written solvency test report is not disclosed in any way, but must be kept in company archives and will resurface if a company goes bankrupt shortly after having declared a dividend. It is important to note that the solvency test must be performed not immediately before or after the general meeting declares a dividend, but immediately before the board wants to actually pay the dividend to the shareholders -in Belgium it is common that the annual general meeting, often held in May, declares a dividend, but that this is only paid into the accounts of shareholders in November or December; it is then at the latter stage that the test must be performed, taking into account the liquidity situation of the company at that moment in time.

I think it was a policy mistake not to extend this new solvency test to public companies. However, in the NV too, a board may violate its duty of care if it suggests to the general meeting[119] to distribute a dividend in cases where it should be clear that such a distribution

[117] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, *OJ L 169,* 30.6.2017, p. 46–127.For the balance sheet test under the BCAA in the BV, see article 5:142 BCCA, for the NV, art. 7:212 BCCA.

[118] Article 5:143 BCCA (liquidity test).

[119] Which under Belgian law is the competent body to declare dividends, not the board, except for so-called "interim dividends", paid out of the profits of the current accounting year (interim dividends are only permitted if there's a clause in the articles granting the power to declare them to the board).

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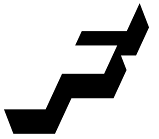

may cause liquidity problems for the company.[120] But in an NV, the board will not have the legal power to suspend a dividend payment that has been approved by the general meeting.

The BCCA also introduced the right for the company (or its liquidator or insolvency trustee) to reclaim from shareholders dividends that these received unlawfully, for instance when the dividend is paid in spite of a negative balance sheet or solvency test.[121] However, in the NV (public company) the company will have to prove that the shareholder knew or should have known that the dividend payment was unlawful -such proof will be easy to deliver in the vast majority of NVs, which are often de facto closed companies with only a handful of shareholders most of whom are also directors and all of whom (often) are closely involved in the company. In larger companies with many shareholders, bad faith will be difficult to prove. Controversially, for the BV (private company), the BCCA makes clear that good or bad faith are irrelevant: any unlawful distribution can be reclaimed from the shareholders who received it, also when they acted in good faith. Private equity firms have announced that this difference between NV and BV is another reason, in addition to the lack of an explicit solvency test and clearer rules on directors' duties in case of "serious losses" (see *infra*, next paragraph) for them to prefer NVs as investment and acquisition vehicles rather than BVs.

The rule on serious losses, well-known in public companies from art. 58 of the consolidated Company Law Directive, has in Belgium always applied to private companies as well, and was maintained for both public and private companies in the reform[122]. But since legal capital was abolished for private companies, it had to be reformulated. For BVs, the rule now is that the directors need to make sure that the general meeting convenes and discusses the future of the company and its financial viability based on proposals submitted to it by the board within two months starting from either the moment net assets[123] became negative or "threaten to become negative" or the moment when it becomes clear that somewhere in the next 12 months, the company will no longer able to pay its debts as they fall due.[124] It must be admitted that this provision expects the directors to engage in a tricky evaluation -especially the reference to net assets that are sliding towards negative territory but are not quite negative yet has disgruntled directors. The situation is especially bad because the rule couples vague indicia of financial problems to a very precise and strict two month deadline, and attaches liability to

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[120] See e.g. K. VAN HULLE, "Wettelijke beperkingen inzake winstuitkeringen" in *Het gewijzigde vennootschapsrecht, special edition TBH-RDC* 1984, 77, nr. 6; H. DE WULF, "Moet de mogelijkheid tot winstuitkering volgens artikel 617 W.Venn. steeds aan de hand van de laatste jaarrekening berekend worden ?", *TBH-RDC* 2005, 393-400.

[121] See articles 5:144, 6:117, 7:214 BCCA

[122] See article 5:153 (BV) and 7:228 (NV) BCCA.

[123] Total assets minus debt.

[124] Art. 5: 153 BCCA.

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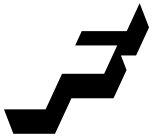

missing the deadline: for both NV and BV, there is a presumption in statute that if the general meeting is not convened or convenes after expiry of the two month deadline, this breach of the law is the cause of the fact that some corporate creditors remain unpaid, resulting in potential personal liability of directors towards these creditors.[125] Again, legal advisors to private equity funds have said that they prefer the mathematically applicable version of the rule for public companies -there, a meeting needs to be called when net assets sink below the amount of 50% of legal capital- and that this may be a reason for preferring the use of NVs in acquisition structures.

A final example of how the BCCA has improved upon the old rules on protection of corporate creditors, are the rules on the partial "successor" liability of former shareholders for a dissolved company's unpaid debts. Under the old legislation, the court of cassation had ruled that, since shareholders in a dissolved corporation could not be regarded as the company's successors, creditors who remained unpaid even after the liquidation had been closed and the company had disappeared as a legal entity, did not have claim against those shareholders for those unpaid debts[126]. This was regarded as unjust in those (not uncommon) cases where the shareholders had themselves received company assets as part of the liquidation procedure. The BCCA therefore introduced two new rules: first, if the creditor-plaintiff can prove that the shareholder knew or ought to have known that it (the shareholder) received assets in spite of there still being unpaid debts at the level of the company, such a shareholder could be held liable for the former company's debts to the amount of the value of the assets the shareholder received.[127] Such "bad faith" is usually easy to prove in SMEs with only a handful of shareholders, usually closely involved in the company's affairs. If, however -second rule- the company was liquidated using a "turbo liquidation" procedure -meaning the liquidation procedure is closed on the same day the company is dissolved, because allegedly all company debt had been paid prior to the dissolution, and so the whole affair can be concluded in one day through one meeting and one notarial deed -the BCCA provides that shareholders are in any case liable for the former company's unpaid debts to the amount they received from the company as part of its liquidation, without the creditor having to prove any bad faith- good or bad faith are irrelevant in this case.[128]

5. *An increased focus on directors' duties as a counterweight for flexibility ?*

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[125] Case law over the past 40 years has shown that it's hard to convince courts that the causal presumption in the BCCA has been rebutted, in other words, that the plaintiff creditor would have remained unpaid even if the general meeting had been called in a timely manner. See already J.-FR. GOFFIN, *Responsabilités des dirigeants de sociétés*, Brussels, Larcier, 2004, 189 ff.

[126] See Cass.17 June 1965, *Pasicrisie* 1965, I, 1134.

[127] See art. 2:104 § 2 BCCA.

[128] Art. 2:104, §3 WVV.

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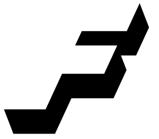

Already in the 1990s, leading European corporate law scholars had argued in favour of replacing some inefficiently worded black letter corporate law rules with a greater reliance on directors duties to make sure companies "did the right thing".[129]The drafters of the BCCA were sensitive to this line of thinking, and also saw a counterweight against the increased flexibility of substantive statutory rules in an increased stress on directors' duties, including explicit duties to inform shareholders. Examples of the latter are the (new) requirement for directors to draft a written report for the general meeting before every new issuance of shares, unless the shareholders unanimously waive this requirement, which is not even allowed when contributions in kind are involved. The report needs to inform the shareholders of the impact of the issue on their financial and governance ("power") situation.[130] Another example is that the number of occasions where the board needs to draft a report to inform shareholders about the potential impact of a change to class rights, has increased.[131] In the BV, a prime example is the new already discussed obligation for the directors to perform a written solvency test before every distribution and transaction subject to the distribution tests, such as a share buy-back or providing financial assistance.

One could argue that reliance on directors performing their duties is not very convincing in a system that still makes it difficult for shareholders to enforce those duties through liability claims against directors. Some have criticized the new cap on directors' liability, to be briefly discussed presently, from this perspective. More convincing is the criticism that the BCCA did not reform the rarely used derivative action.[132] But before discussing those criticisms, I want to point out that the often heard allegation that directors are almost never held liable or at least do not have to pay any out of pocket damages, is simply not true for Belgian small and medium-sized companies. In listed companies and very large unlisted companies, it is indeed true that liability claims are very rare and usually covered by D&O insurance. I'm unaware of any attempts at gathering precise descriptive statistics about this for Belgium, but in smaller companies, where D&O insurance is rare, all indications are that liability claims are usually launched, when at all, after insolvency or, prior to insolvency, by tax or social security authorities. The latter launch a few dozen claims per year, almost always in SMEs, based on special statutory rules making executive directors personally liable for a company's tax debts

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[129] E.g. P. DAVIES, "Directors' Creditor-Regarding Duties in Respect of Trading Decisions Taken in

the Vicinity of Insolvency", *EBOR* 2006, 301-337; E. WYMEERSCH, "Article 23 of the second company law directive: the prohibition on financial assistance to acquire shares of the company" in J. BASEDOW, K. HOPT en H. KÖTZ (eds.), *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag*, Tübingen, Mohr Siebeck, 1998, 725 ff.

[130] Art. 5:121 (BV) and 7:179 (NV) BCCA.

[131] See e.g. art. 5:102 BCCA.

[132] The derivative action is governed by arts. 7:157 through 7:159 BCCA (NV) and 5:104 and 5:105 BCCA (BV).

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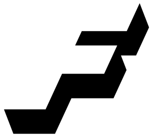

in situations for which statute contains a presumption that if the company did not pay the taxes due, this must be because of the negligent administration of the directors[133]. One should also not lose sight of the fact that in SMEs, shareholders and directors are two largely overlapping categories, and Belgian law contains several provisions that allow shareholders to be held liable. We have already pointed towards the rule that in a grossly undercapitalized company that goes bankrupt within three years after it had been set up, company founders can be held jointly and severally liable for the company's net debts (i.e. all debts that he insolvency trustee cannot pay with the proceeds of the assets of the company); and to the liability of shareholders to the amount of what they unjustly received in the course of the company's liquidation or as a result of an unlawful dividend distribution. Again, this type of liability is not encountered frequently, but still every year some directors or shareholders "fall victim" to it, and more than a handful are sued on these bases. Compared to civil liability claims (but not in absolute numbers), criminal complaints against executive directors are also a relatively frequent occurrence, usually because the company has failed to comply with some form of regulation (e.g. on overtime work payments, or employee privacy rules) and the Penal Code provides that in addition to the company, executives can also be liable for this type of violation, either simply because the Penal Code explicitly attributes criminal responsibility to them or they are deemed to have failed in their oversight duties, making them an accomplice or accessory to the company's crime[134]. Liability is not non-existent at SMEs, and the many complaints heard from directors and their advisors about liability risks in insolvency or because of the new rules on unlawful dividend distributions prove that liability is on many directors' minds.

A fairer criticism of the liability regime is that it is, in a way, more difficult for the company than for outsiders like the tax authorities to hold directors liable. Unless there has been a change of control or an insolvency trustee acts on behalf of a bankrupt company, the company itself will rarely sue its own directors. Controlling shareholders, if they have not appointed

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[133] It would take us too far here to describe the technical rules. See art. XX.226 WER, art. 442quater Belgian Income Tax Code and art. 93undecies Belgian VAT Code.

[134] The best known case in this respect is one where the chair and a high-ranking executive of a large company were criminally convicted, as aiders and abettors, because they had failed to organize a discussion at board level of environmental problems (stench over a city neighbourhood produced by "unwashed" smoke from a factory; the company had not installed the "washing installation" required by its environmental permit, but only a lower-grade system) caused by the company, problems that they, contrary to some other non-executive directors, had knowledge of. The problems could have been prevented by allocating a bigger budget to technical interventions to prevent the pollution, and although the court acknowledged that the non-executive chair and the executive did not have the legal or factual powers to stop the problem on their own, they had failed in their duty to put a discussion of the problems and increase in the necessary budget on the board's agenda: Cass. 5 June 2012, P.11.2140.N., with comments by P. KORTBEEK, "Over toerekening van strafrechtelijke verantwoordelijkheid binnen de raad van bestuur bij falend risicobeheer", *T.B.H.* 2013/9, 883-893. There are, however, with some regularity prosecutions and convictions in similar but less high profile cases.

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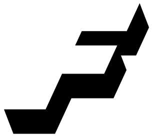

themselves as director, prefer to deal with malfunctioning directors in other ways than through a liability claim (mainly by not reelecting them). But while in Belgian public companies, minority shareholders have had a derivative action at their disposal between 1873 and 1913 and, again,in both public and private companies, since 1991 till today, it is true that this is structured in an unattractive way, meaning that such actions are hardly ever launched. The main problem is not the height of the ownership threshold -1% in public companies and 10% in private companies[135]. These thresholds were discussed by the reform committee, and it was decided not to lower them because the thresholds are, in the opinion of the reform committee and no doubt a majority of the corporate bar, necessary to ensure that plaintiffs have some real skin in the game. After all, a derivative action is only possible, in Belgium, after the majority of shareholders at general meeting have decided to grant a discharge to the incumbent directors, meaning the company has waived its right to sue the directors for any breaches of duty they may have committed over the past accounting year and the results of which were not hidden on purpose in deficient annual accounts and management reports[136]. The main problems are the moment the threshold needs to be reached (at the general meeting that decides to grant discharge, meaning, among several other debatable or simply unclear rules, that anyone acquiring shares after that date who then finds out about the director's malfeasance, cannot sue derivatively), the allocation-of-cost rules and of course the massive collective action problem that is present in any derivative action system. It would lead us too far to here discuss the many technical and policy defects of current Belgian rules on derivative actions[137] , but it sure was a missed opportunity that the expert committee did not suggest any changes to those rules[138] (although, as indicated, the committee did devote attention to the question whether an ownership threshold was justified at all, with the majority reaching the conclusion that it was unwarranted to lower or abolish the threshold).

6. *The cap on directors' liability*

A criticism that was voiced repeatedly by scholars against the idea that the BCCA relies on directors' duties to balance the increased freedom companies have received to organize

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[135] See respectively article 7:157 (1%) and articles 5:104 and 6:89 (10%) BCCA.

[136] See art. 7:149 for the rules on discharge in public companies.

[137] See for such a discussion, H. DE WULF "Aandeelhoudersvorderingen met het oog op schadevergoeding: of waarom elke aandeelhouder vergoeding van reflexschade kan vorderen, België class actions moet invoeren en de minderheidsvordering moet hervormen", in *10 jaar wetboek vennootschappen in werking/10 ans d'entrée en vigueur du code des sociétés,* Mechelen: Wolters Kluwer Belgium, 2011, 475-522.

[138] In defense of the Committee, this is a typical example of an issue for which the committee simply did not have enough time in view of the need to draft the new Code in under two years, and in view of the fact that not all committee members had a favorable view of the derivative action as such.

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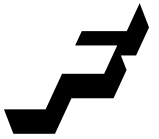

themselves, is that the BCCA for the first time in Belgian history introduced a pretty unique liability cap for directors. Art. 2:57 BCCA divides companies (and non-profit-organisations) governed by the BCCA into five categories according to their size as determined using balance sheet and turnover figures. For the smallest category, micro-entities, liability of directors for a breach of duty or other liability-engendering fact pattern is capped (by statute) at 250.000 euros, whereas for the largest companies, including all listed companies irrespective of size, it is limited to 12 million euros. "In exchange", art. 2:58 BCCA provides that the company may not in advance exonerate directors from liability for certain breaches of duty -in other words, waive its claims for such breaches before the breach was committed. This was just a confirmation of the dominant and only sensible opinion held on this topic under Belgian law for the past half century or more. But art. 2:58 BCCA contains a second rule which was a reversal of the law as it stood before, namely that companies may not provide hold harmless cover to their directors (nor may subsidiaries to the parent's directors). This means the company may not enter into contractual or other arrangements with directors in which the company promises to fully or partially compensate the director for any damages or compensation the director has to pay to outside parties. However, art.2:58 BCCA does not outlaw hold harmless arrangements provided to the benefit of directors by shareholders (such as the parent company) of the company; it's only the company that may not provide such cover. Of course, art. 2:58 does not affect the possibility for the company to take out and pay for D&O insurance for its directors.

The revolutionary idea for the liability cap for directors came from the hat of justice minister Geens himself (to the initial surprise, I may say, of his faithful experts). I think he had mainly non-executive directors of large organisations in mind, whose theoretical liability position is indeed sad compared to that of top executives who are not board members and compared to external auditors. For many years now, external auditors, who for their activities usually enjoy the support of large professional firms with very deep pockets, have enjoyed a liability cap of 12 million euros in Belgium.[139] Top executives who are not on the board are not subject to corporate accountability measures such as direct control by shareholders and are, when they are employees of the firm, protected from liability except for their gross negligence which almost amounts to intent.[140] Nevertheless, if companies or their creditors suffer serious harm as a result of mismanagement or unlawful decisions, more often than not it is top executives who are responsible for these woes, whereas the non-executive directors at large companies are usually rather powerless, do not themselves take the decisions that wreak havoc but at most fail to prevent executives from performing such misdeeds, and are not supported by a cohort of support staff like auditors are. Usually they are underinformed, at least compared to top managers, about what's really happening in the company (a problem that no legal system in the world seems to have successfully tackled). Also, Belgium has nothing like the Delaware

[139] See article 24 of the law of December 7, 2016 organizing the profession of and public supervision of the auditors (which reiterates an older provision).

[140] Art. 18 of the Belgian Employment Contracts Act.

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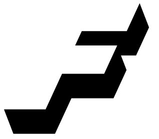

business judgment rule to protect directors against claims for breaches of their duty of care.[141] What also played a role in the germination of the idea of a liability cap is that the directors of Fortis, until November 2008 one of the largest Belgian and indeed European banks, and especially those of its successor firm, had for a while been uninsurable (through a D&O liability policy).[142] But this was a one-off, very exceptional case and there were no signs of a D&O insurance crisis in Belgium.

I think the cap could have been a good idea if it had been designed in a better way. Statute should have provided that liability of directors was indeed capped, so that hapless directors who were liable for unintentional[143] mistakes would not be personally ruined if they were uninsured, while universal D&O insurance cover would have remained feasible. But the cap should have been accompanied by mandatory D&O insurance with a mandatory "deductible" for which the directors would in always be personally liable (out of pocket), with additional cover for this by the company being declared unlawful. The mandatory insurance would normally provide victims of directorial malfeasance with a reliable source of compensation, while the mandatory deductible would have ensured directors had personal skin in the game, in other words were exposed to a big enough financial incentive (other than fear for their reputation on the job market) to exercise due care -if they committed faults they would have to pay a certain amount of damages out of pocket. Ideas for a different cap-system along these lines, never vigorously defended, surfaced relatively late in the legislative process, and were rejected by the majority within the expert drafting committee because it was felt a mandatory D&O system would have imposed a *de facto* tax on SMEs who perhaps did not need it, while the economics of such an insurance system were, according to some, uncertain.

Outside academia -where especially some tort law scholars could not believe that anyone seriously contemplated such a system[144]- there was surprisingly little resistance against the

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[141] In spite of the fact that art. 2:56 BCCA has now codified the court-developed doctrine of "marginal review", stating that in cases where there is room for business judgement, directors can only be deemed to have committed a fault (breach of the duty of care, but that's not how the Belgian legal system formulates this) if their decision falls outside the range of decisions that reasonable persons would find acceptable.

[142] The existing insurer had terminated the policy when the Benelux governments had to rescue Fortis during the 2008 financial crisis, and for more than a year after that, it appeared no insurer wanted to touch the company/its directors -somewhat ironic since the (soon again successful) branch of Fortis (renamed Ageas) that remained in Belgium and was not sold to the French was an insurance company. Much information on this is available in the answer to a parliamentary question by B. PAS of 23 September 2009 available at [www.dekamer.be/QRVA/pdf/52/52K0054.pdf.](www.dekamer.be/QRVA/pdf/52/52K0054.pdf)

[143] The cap as it is does of course not apply to intentional "faults".

[144] The cap also applies to tort liability of directors. For an incisive (though in my view not completely convincing) critique of the cap, arguing that it is an unconstitutional violation of the equality clause in the Belgian constitution, since there are, according to the author, no good reasons for limiting the

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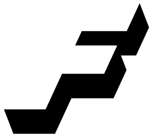

cap. The corporate defense bar of course loved it, and in private several attorneys argued the cap would become the selling point *par excellence* for the Belgian reform to foreign entrepreneurs.

However, on the day that the draft BCCA would have been voted in the plenary session of Belgian parliament, a political crisis caused the government to become a minority government, and the newly reinforced opposition managed to get a last minute amendment approved that eviscerated the whole cap system. While the draft text had excluded the cap for intentional breaches of duty and for gross negligence that had contributed to the insolvency of the company, the opposition amendment inserted an additional clause stating that the cap would only apply to "light mistakes" (*culpa levis*), i. e. "ordinary faults or negligence". At the time of writing, the first court cases about the interpretation of this concept are pending, but most scholars think the amendment means the cap will largely be meaningless in practice, because directors are rarely sued on an allegation of mere ordinary negligence, and also because judges who have been convinced by plaintiffs that directors behaved negligently, might -we have to wait and see- now rule more quickly that in the past that the alleged negligence should not qualify as "mere" negligence but rather as gross or aggravated negligence (against which the cap offers no protection).[145]

V. Loyalty shares: a demand of controlling shareholders

While "one share one vote" is a mere default rule in non-listed companies, which consequently can create classes of shares with multiple voting rights or without any voting rights, in listed companies multiple voting rights per share are not permitted, except in the form of loyalty shares.[146] Those are registered shares, registered in the name of one and the same shareholder for a period of at least two years, which yield double voting rights, provided the company has opted into the system through an amendment to its articles of incorporation. When the shares are sold or transferred in any other way, the loyalty voting right lapses and

liability of directors compared to others and as opposed to the good reasons for limiting auditor liability, see M. KRUITHOF, "De begrenzing van de bestuurdersaansprakelijkheid (artikel 2:57-58 WVV) getoetst aan het gelijkheidsbeginsel (artikel 10-11 Gw.)" in H. DE WULF and M. WYCKAERT(eds.), *Het WVV doorgelicht*, Mortsel, Intersentia, 2021, 379-446. Another tort law scholar who gave scathing criticism was L. CORNELIS, "De (restanten van) bestuurdersaansprakelijkheid" in H. DE WULF and M. WYCKAERT(eds.), *Het WVV doorgelicht*, Mortsel, Intersentia, 2021, 333-378.

145 However, there are persistent rumors emanating from the bar, and especially from insolvency trustees, that the courts in Antwerp are loath to hold directors liable and that judges there will be reluctant to rule that a director committed anything more than "mere" negligence. We will have to wait for the first liability decisions under the new Code.

146 Art. 7:53 BCCA.

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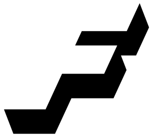

the new owner is subject to a new two year holding period before he can enjoy the double voting rights (the latter rule is subject to limited exceptions, such as the case of descendants inheriting the shares). If a company opts into this tenure voting system, the double voting rights must be granted to every shareholder meeting the statutory conditions, a rule which cannot be modified in the articles of incorporation. This means it's not possible to grant the double voting rights to only a certain class of shareholders, like the founders and their descendants.

The 2019 company law reform would not have been politically possible without the support of the VBO-FEB, an advocacy organization that represents large Belgian firms[147], and one of the most important demands of the VBO-FEB was the introduction of some form of loyalty voting. Belgium had formally introduced a one share one vote rule for public companies[148] in 1934, but from the 1980s onwards, various politicians and entrepreneurs had lobbied for the introduction of dual class shares at listed companies.[149] The debate received renewed and this time also academic impetus when the European Commission in 2005-2007 briefly considered making one share one vote mandatory throughout Europe, but soon backtracked[150]. By the time the Belgian reform effort got under way, company law academics as well as Guberna, the Belgian Governance Institute that began life in the 1990s as the Institute for Directors, were all in favour of allowing dual class structures within certain limits[151]. The longstanding French example of loyalty voting was taken as an inspiration, though there was a consensus from the beginning that the system would have to work on an opt-in basis and that therefore the approach of the French *Loi florange* [152]needed to be rejected. Under the French system, all listed

[147] And is the official representative of these firms in the so-called "social negotiations" (between labour and employers) about labour including wage conditions that are part of the unique Belgian political governance model.

[148] Never for cooperative companies. When the private company was introduced in 1935, it was ordained that all shares should have one vote, until a 1991 reform allowed non-voting stock, but not multiple votes, which remained outlawed for private companies, too, until the 2019 BCCA.

[149] For the early history of the one share on vote rule in Belgium, efforts to change it, the changing mood in academia, and a plea for allowing multiple voting rights in listed companies as well (but always to be introduced before the listing), see H. DE WULF "Meervoudig stemrecht in vennootschappen: flexibiliteit gewenst" in *Van alle markten. Liber amicroum Eddy Wymeersch*, Antwerp, Intersentia, 2008, 369-397.

[150] See T. BUCK, " McCreevy steps back from straight push on 'one share one vote'", *FT* 6 June 2007.

[151] See H. DE WULF, footnote 130.

[152] Loi du 29 mars 2014 "visant à reconquérir l'économie réelle" (= the impossibly French title of the Act: "aiming to reconquer the real economy"). On this law in a broader context, see e.g. M. BECHT, Y. KAMISARENKA, and A. PAJUSTE, "Loyalty Shares with Tenure Voting - Does the Default Rule Matter? Evidence from the Loi Florange Experiment" (April 1, 2018), available at https://ssrn.com/abstract=3166494.

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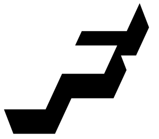

companies are automatically subject to the loyalty voting system, except if they choose to opt out with the 2/3rds majority required for changes to the articles of incorporation. At least one reason why the French government chose for this change to its 1966 law was that it wanted to make it easier for companies in which the French state was a major shareholder to enjoy the loyalty voting system. While rejecting the French opt-out approach, Belgian policymakers, while also acknowledging the academic point that the introduction of a true dual class system ought not to be allowed after the IPO (i.e after a firm had become listed), from the start agreed that introducing loyalty voting in Belgium only made sense if existing controlling shareholders of already listed Belgian groups could also enjoy the system.[153] They, after all, had always been the main lobbyists demanding such a system. This explains why at a certain stage, the government suggested that listed companies should be allowed to adopt loyalty voting with a simple majority (50% plus 1 vote, among those voting at the general meeting and with abstentions not being counted as a vote).[154] Under the influence of the drafting committee, supported by the responsible minister of justice, Koen Geens, a compromise was reached whereby the introduction of loyalty voting would require only a 2/3rds majority[155], which is lower than the 75% majority that is normally required for regular changes to the articles of association.

In any case, loyalty voting was introduced for two reasons in Belgium: in order to allow existing controlling shareholders of listed firms to cement their control and retain it even when they would sell some shares (usually for liquidity reasons) and thus lower the percentage of shares they held in the target, and because both policymakers and academics hoped the availability of the technique would convince a number of start-up founders to take their companies public while retaining control through loyalty votes. The latter would be possible because of the statutory provision that only registered shares can enjoy double voting rights. Only controlling shareholders or major blockholders, whose shares are (usually) not listed and who rarely trade, are as a rule prepared to have their shares registered in their name, mainly because registration in Belgium hinders free transferability on a stock exchange. So while formally, the Belgian rules award loyalty votes to all shareholders who meet the two year holding period requirement, in practice controlling shareholders knew it would be mainly they, and perhaps a few long term pension funds, who would enjoy double voting rights.

[153] For the political debate about loyalty voting in the course of the preparation of the draft BCCA, see H. DE WULF, "De totstandkoming van het Wetboek van vennootschappen en verenigingen : enkele impressies over het maken van wetgevingsworsten", in I. Claeys (ed.), *Recente wetgevende hervormingen : nieuw en beter?,* Mechelen, Kluwer, 2021, (85) 142.

[154] This was the only change the cabinet, when approving the draft bill so it could be submitted to parliament, made to the expert committee's draft, though it should be stressed that at that stage, the draft text had already been vetted by a so-called inter-cabinet committee (assembling the personal advisors of cabinet ministers) and this had led to some amendments of the initial draft.

[155] Art. 7: 53 § 1 BCCA. In several European jurisdictions (like e.g. France), but not in Belgium, 66% is the majority required for changes to the articles of association.

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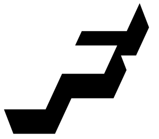

Remarkably, politicians from the (Belgian) Green and Social Democrat parties found themselves in a *de facto* coalition with controlling shareholders about the introduction of loyalty voting. Politicians from these then opposition parties tabled amendments to the government's bill in order to allow the introduction of loyalty voting with a simple majority at the general meeting, or even to make it mandatory for listed companies.[156] The official motivation for these proposed amendments referred to the need, after the financial crisis, to combat short termism and to stimulate long term shareholder engagement. I believe one can fairly state that these politicians were gullible and were not aware that their proposals would reinforce the power of the "old money old school", very capitalist controlling shareholders who are indeed long term shareholders, but who on average pursue their own long term private benefits.

Until now, 4 years after the new BCCA entered into force, loyalty shares have indeed been used to reinforce the power of controlling shareholders. This is apparent when one looks at the 11 companies that have adopted loyalty voting provisions[157]. Each of these was already listed when they adopted loyalty voting.[158] Not a single Belgian company has introduced loyalty voting at the moment of going public (or before). As the empirical research of Theo Monnens has shown, all these companies had controlling shareholders, and in four of them, that shareholder has indeed sold part of its holdings after the introduction of loyalty voting[159].

As an academic, it was my conviction from the start, while the draft law was still under construction, that if policymakers really wanted to contribute to the attractiveness of listing on Euronext Brussels, they should have allowed true dual class structures[160], that is multiple

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[156] Amendment nr. 531 submitted by Mrs. Almaci and Mr. Vanden Burre, *Parl.St.* Kamer 2018-19, 54-3119/016, 145 and Amendment nr. 163 submitted by Mrs. Almaci, Mrs. Gerkens and Mr. Vanden Burre, *Parl.St.* Kamer, 2017-18, 54-3119/006, 79.

[157] Two more companies tried to introduce loyalty voting, but the board's proposal to that effect was defeated at the general meeting (obtaining a majority of votes, but not the required 75% majority). The prominent example is Bekaert NV, see E. VERMORGEN, "Aandeelhouders Bekaert blokken dubbel stemrecht af", *De Tijd* 15 July 2021, https://www.tijd.be/markten-live/nieuws/aandelen-brussel/aandeelhouders-bekaert-blokken-dubbel-stemrecht-af/10320064.html.

[158] I refer here to the empirical research of Theo Monnens incorporated in S. DECLERCQ, J. DELVOIE, TH. MONNENS and T. VOS, "Loyalty voting rights in Belgium: nothing more than a control-enhancing mechanism?" published in this issue of *ECFR*.

[159] See para. 29 of the Declercq, Delvoie et al. article (previous footnote).

[160] Legally, and at least under Belgian law, loyalty shares are not a separate class of shares. The justification given for this is that the special voting rights provided by such shares lapse upon a transfer of the shares, and are thus not really attached to the shares, but a result of the holding period or, alternatively, should be regarded as accruing to the owner of the shares (instead of to the shares

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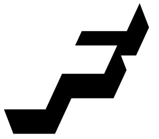

voting rights in listed companies, from the start. Double voting rights make a limited difference, and probably not enough to convince founders to sell enough shares to the market to get the founder's stake below 20%. On the other hand, one may wonder whether the double voting right limitation makes sense in a system where there is no limit on the number or percentage of non-voting stock that a listed Belgian company may issue. Probably it will be difficult to convince investors other than employees who are awarded such stock as part of their remuneration to buy such shares, unless they are awarded preferential dividends (something which is no longer mandatory, as it used to be, for non-voting shares under Belgian law). Still, if a "growth company" is attractive enough financially in the eyes of investors, they may be prepared to settle for this, as happened in the case of the IPO of Snap (admittedly a US company and not Belgian at all…).

VI. Classes of shares: an attempt to clarify the rules partly backfires

As discussed by Marieke Wyckaert in a separate contribution to this issue of ECFR, the rules on classes of shares were also reformed, with the goal of making them clearer and thus to enhance legal certainty. However, while the reform cleared up certain issues, other questions of interpretation were created, meaning this part of the law will in all likelihood be reformed again in 2024[161].

Under the former Belgian companies act, while there was no statutory definition of the class concept, it was universally agreed that a company could be said to operate with different classes of shares when not all shares enjoyed rights that were proportional to their par value.[162]The new definition of class is more aligned with the approach in some leading European jurisdictions[163], namely the assumption that as soon as not all shares of one and the

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themselves). From an economic perspective and as a matter of fact, loyalty voting in my view does create two classes of shares, and in fact such shares also conform to the statutory (Belgian) definition of classes of shares, namely every situation in which not all the shares of one and the same company give rise to the same rights (financial or governance (such as voting) rights).

161 Marieke Wyckaert and myself are currently drafting a bill to that effect which, after discussion with our colleagues from the BCV-CDS, we will present to the relevant politicians over the summer of 2023 in the hope it can be adopted in parliament by the end of 2023 or in early 2024.

162 In the sense of the accounting value (nominal value or true par value) that expresses which fraction of legal capital a share represents. About the old rules on classes of shares, see e.g. M. WYCKAERT *Kapitaal in N.V. en B.V.B.A.*, Kalmthout, Biblo, 1995, 528 ff.

163 Of which I became aware through my work on the EMCA (European Model Companies Act, see https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929348), and which inspired me when I designed the first draft of the chapter on shares in the draft BCCA.

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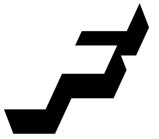

same company enjoy exactly the same rights, there are two (or more) different classes, all other considerations being irrelevant.[164] There is no link anymore with legal capital or par value, not even in public companies that still mandatorily need to maintain a legal capital, and the issue price plays no role at all[165]. However, the old Belgian approach that if the rights of one class are changed, all other classes need to consent through the special procedure for changes to class rights, was maintained. The procedure for changes to class rights is that the board needs to present a written report to shareholders in advance of the general meeting to explain what impact the change to class rights may have on the position of shareholders, so that these can vote on an informed basis, and that the change is only approved if it obtains 75% of the votes within each class, and not just at the general meeting as such[166]. This means shareholders holding 25% plus one share of sometimes very small class of shares, will obtain veto power over certain important decisions. The rule has been in effect in Belgium since class rules were introduced in the 1950s, but will have to be applied more often than in the past because of the increased use of dual class structures. This is why it is currently being contemplated to change the BCCA to switch (for the first time) to a rule which is used by several European countries, namely that only those classes need to separately vote on a change of class rights that would be negatively affected by the proposed change. Of course, the concept of "negatively affected" will give rise to problems of interpretation, but the rule change would decrease the number of cases where minority shareholders are given "hold-up power" over certain decisions.

Indeed, every observer of the corporate landscape in Belgium agrees that classes will occur more frequently than in the past, for the simple reason that they were outlawed in private companies in the past, while the BCAA offers more flexibility, including concerning voting rights in public companies, than ever before in differentiating between shares concerning the rights attached to those shares, thus creating classes. But most practitioners correctly express the opinion that they will advise their clients not to use the new flexibility offered by the BCCA unless it really serves a purpose[167]. Indeed, research by C. Van der Elst[168] of all the articles of association of BVs newly incorporated between October 1 and December 31st 2019, showed

[164] See the definition of class in articles 5:48, 6:46 and 7:60 BCCA.

[165] Thus, if all shares of a company have equal rights, but some were issued for 100 and others for 60 per share, these by no means form two separate classes.

[166] In addition, there is a quorum rule, namely that in principle, the vote can only be valid if at least 50% of the shares in each class are present, but if this threshold is not reached, a second general meeting (with the same agenda) can be called where no quorum will apply.

[167] See E. DE BIE, "'L'imagination au pouvoir': worden 'disproportionele' lidmaatschaps- en vermogensrechten het 'nieuwe normaal' in de BV?" in F. Buyssens en A.L. Verbeke (eds.), *Notariële actualiteit 2018-19*, Antwerpen, Intersentia, 2019, 325 ff.

[168] C. VAN DER ELST, "De invloed van het nieuwe WVV op het vermogen, de aandelenstructuur en de aandelenoverdracht van en bij BV's: Een empirisch onderzoek" *TRV-RPS*, 2020, 349-361.

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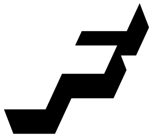

that a negligible number[169] of companies set up after the enactment of the BCCA used classes of shares. Creating separate classes means many future decisions of the general meeting will have to go through the special procedure of changes to class rights, including each time the company issues additional shares of only one of those classes or does not maintain the balance between classes.[170]

In reality, classes of shares are and will be used in Belgium in mainly three circumstances. First, some large companies award non-voting stock to employees as part of their remuneration package. Second, when venture capitalists or private equity funds invest in a company, such investors will often award themselves shares with liquidation preferences that are callable upon liquidation events, meaning (usually) exits from the target company, and they will also often award an incentive package to those target company managers that they retain and such packages may contain shares with special rights. Third, in typical *Mittelstand* family firms, the parents who are majority owners of the firm will often, as part of succession planning, want to donate all or most of their shares to their children while the parents are still alive, but while retaining some control or/and financial rights. Typical situations outlined in the estate planning literature are family firms where all shares have equal rights and are all owned by an ageing couple that have three children. In their fifties or sixties, the couple donate all shares except for two to their children in a tax neutral way, but before doing so, they change the articles of association to make sure the two shares they retain give them, the parents, veto rights against their own dismissal as directors, or so many voting rights that the parents can determine the general meeting's (and thus the company's) dividend policy without the input of their children, even though the latter own 99.98 % of the shares.

According to some Belgian scholars-attorneys[171], changing the articles in order to change the rights awarded to the shares that the parents will retain in this example, is not possible in accordance with the rules on changes to class rights (requiring a 75% majority per class), but requires unanimity among shareholders, unless the new class is created through issuing new shares for which a correct contribution is paid and not through changes to the rights attached to the existing shares.[172] This unanimity requirement plays no practical role if, as in the

[169] The author does not provide a percentage.

[170] See arts. 5:102, first paragraph and 7:155, first paragraph BCCA.

[171] M. Wyckaert in H. De Wulf and M. Wyckaert, "Effecten bij BV, NV en CV: Categorieën, Soorten, Overdracht, Uitgifte en Inkoop" in H. De Wulf and M. Wyckaert (eds.), *Het WVV doorgelicht*, Mortsel, Intersentia, 2021, (77) at 123-125; J. Delvoie en S. Declercq, "From zero to hero: meervoudig stemrecht in NV en BV na het WVV" in H. De Wulf and M. Wyckaert (eds.), *Het WVV doorgelicht*, Mortsel, Intersentia, 2021, 249-304.

[172] See the position defended by M. Wyckaert in a text jointly written with me, where I defended the opposite view (we agreed to disagree): H. De Wulf and M. Wyckaert, "Effecten bij BV, NV en CV:

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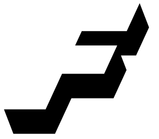

example, the parents own 100% of the shares, but makes such succession planning solutions nigh impossible if there are outside investors in the firm. I have rejected the unanimity requirement[173]. The technical-legal arguments of both sides in this debate need not detain us here, suffice it to say that while I admit that allowing (in private, unlisted companies) midstream changes to the rights attached to certain but not all shares is odd in a world where one pursues the correct pricing of shares when they are issued, the unanimity requirement is at odds with a century of evolution of corporate law, where previously existing unanimity requirements or doctrines about "protected individual shareholder rights" were systematically abolished, and would undermine the explicit goal of the reform to enable (through the use of multiple voting rights) the succession planning techniques sketched above.[174] A sensible solution may be to change statute to introduce the rule that when a company wants to change the rights of some but not all shares of an existing class of shares, such a change requires majority consent of both the shareholders whose shares will benefit from the change of rights and, separately, of those shareholders whose rights will not change but whose position will be negatively affected. Marieke Wyckaert and myself are currently (spring 2023) preparing a draft bill (to then be submitted to politicians, of course) in which such a change to the BCCA will be proposed.

Most practitioners are not happy with the interpretation of the BCCA given by the drafters of the law that so-called "profit certificates" ("*winstbewijzen*, *parts bénéficiares*")[175] should be treated as a separate class of shares. Scholars argue that this was already the case under the old companies act, but practitioners have apparently developed an advisory practice in which they tell clients that such profit certificates, which usually have no voting rights, may only vote on proposed changes to the rights attached to the certificates themselves, but not when they

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Categorieën, Soorten, Overdracht, Uitgifte en Inkoop" in H. DE WULF and M. WYCKAERT (eds.), *Het WVV doorgelicht*, Mortsel, Intersentia, 2021, 118-125.

[173] Successfully, in that while all of the three or four scholars who have written about this topic disagree with me (e.g., with further references, J. DELVOIE and S. DECLERCQ, "De invoering van meervoudig stemrecht en loyauteitsstemrecht in bestaande vennootschappen", *TRV-RPS* 2019, (129) 132-133), my point of view obtained 69% of the vote of more than 100 Belgian corporate law practitioners who attended a debate organized at Leuven University between Marieke Wyckaert and myself, where my good friend Marieke unsuccessfully defended the unanimity-requirement. See https://corporatefinancelab.org/disputatio-2022/ and the common reform ideas Marieke and I jointly issued afterwards at https://corporatefinancelab.org/2022/07/06/soortrechten-na-de-disputatio-enkele-voorstellen-tot-solutio-of-waarover-het-eigenlijk-ging-uit-de-discussie-komen-hernieuwde-inzichten/.

[174] H. DE WULF and M. WYCKAERT, "Effecten bij BV, NV en CV: Categorieën, Soorten, Overdracht, Uitgifte en Inkoop" in H. DE WULF and M. WYCKAERT (eds.), *Het WVV doorgelicht*, Mortsel, Intersentia, 2021, 125-129.

[175] Defined in art. 7:58 BCCA.

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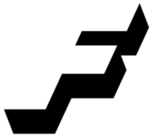

are "merely" affected by changes to other classes of shares. In other words, certificates are not shares (in this view) and therefore not really subject to the rules on changes to class rights. "Profit certificates" are a type of security that may only be issued by public companies and are defined as equity securities that are issued in exchange for a contribution that is not booked as legal capital (and that therefore do not represent legal capital, so that they can be issued without applying the rules that apply to the issuance of regular shares).[176] They entitle their holder to a share of the profits, but only have other rights if these are explicitly mentioned in the articles of incorporation, which in practice means that the majority (but by no means all) profit certificates do not enjoy voting rights. However, they mandatorily get one vote per certificate when class rights (including their own) are changed, and any disproportionate issuance of additional shares is considered to be a change of class rights for all classes. They are usually awarded to certain founders (to give these disproportionate rights compared to ordinary shareholders), certain "preferred" investors or (without voting rights) to employees (including top management).

Relatedly, there is quite a bit of discontent among practitioners that even when profit certificates have no voting rights, their holders must be invited to the AGM, where they may not vote but can take part in debates.[177] Especially when the certificates have been awarded to employees, companies do not want those to attend the AGM. In practice this issue is "solved" by forcing the employees to contribute their certificates to a legal person controlled by management, so that only the manager representing that legal entity may take part in the general meeting. But the need to set up such a legal person is seen as a nuisance by practitioners. Arguably, it was a mistake, or at least not necessary for the BCCA to allow certificate holders to attend the AGM, but on the other hand not allowing this would have been inconsistent in a legal system that allows even bondholders to attend the general meeting of shareholders (but without giving them the vote at that meeting, of course)[178].

Another "clarification" of the rules on classes of shares that practitioners are unhappy about is the rule that when a company has no classes, but wants to introduce a new class of shares (for the first time), the board should draft the report that is required when class rights are

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[176] For discussions of "profit certificates" in Belgian literature, see in addition to the summary in De Wulf/Wyckaert, footnote 153 e.g. S. LANDUYT, "Hybride instrumenten in het Belgisch vennootschapsrecht", *TRV* 2016, 233; D. ROELENS and S. STEEVENS, "Winstbewijzen praktisch bekeken", *TRV* 2010, 283; D. WILLERMAIN, "Commentaire de l'article 438 (parts bénéficiaires)" *Commentaire systématique du Code des sociétés*, Kluwer, looseleaf; T. MOTMANS and M. BRESSELEERS, "Winstbewijzen revisted" in R. Houben and S. Rutten (eds.), *Actuele problemen van financieel, vennootschaps-en fiscaal* recht, Antwerpen, intersentia, 2007, 170; M. WYCKAERT, *Kapitaal in NV en BVBA*, Kalmthout, Biblo, 1995, 138-141 and 571-626; J.-P. BLUMBERG, "Over participatiecertificaten (CPC) of de uitgifte van winstbewijzen voor een geldlening", *TRV* 1991, 325.

[177] Art. 7:127, §1 *in fine* and 7:135 BCCA.

[178] See art. 7:135 BCCA.

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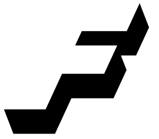

changed. To me it seems obvious that the need for information for shareholders who are asked to vote on the introduction of a new class is at least as pressing as when they are asked to vote to changes to existing class rights. But many practitioners complain that in their opinion - which was not generally accepted- under the old legislation, the rules on changes to class rights did not have to be applied to cases of the creation of a new class of shares, so that the new Code imposes a new administrative burden on companies.[179]

VII. Conclusion: did the reform have the right goals?

There can be no doubt that the BCCA reform was a success from a technical-legal perspective: it created legal certainty about several questions that had long been disputed and, more importantly, abolished many mandatory, inflexible rules that made no sense, in that they were not necessary to protect stakeholders or combat negative externalities. I believe the reform struck the right balance between increasing organizational flexibility for companies and still protecting creditors through corporate law. That the reform was not about increasing flexibility for flexibility's sake, is illustrated by the tightening of the rules on directors' conflicts of interest[180].

In three areas, however, the reform failed to increase legal certainty: the new rules on classes of shares settled some old issues but created new controversies; the rules on the "internal regulations" (which could be translated as "bylaws")[181], not discussed in this article, are not

[179]See e.g. E. POTTIER, Th. L'HOMME, L.-Y. TU,. and G. VISEUR, " Nouveautés en matière de sociétés anonymes et de sociétés cotées" in E. POTTIER. (ed.), *Het Wetboek van vennootschappen en verenigingen: (r)evolutie ? / Le Code des sociétés et associations : (r)évolution ?*, Bruxelles, Intersentia, 2019, (149) 159-160.

[180] Articles 5:76, 6:64, 7:96 and 7:102 BCCA.

[181] "Intern reglement" in Dutch, "règlement interne" in French. Belgian companies are, of course, set up through an act of incorporation (calling this, as is common in English, the "articles of incorporation" is not suitable to the Belgian context, since this act is not composed of articles). This "constitution" contains three parts, one of which are the articles of association, which can be amended by the general meeting of shareholders during the life of a company (with a 75% majority in corporations, usually with unanimity in partnerships) (the other two parts of the act of incorporation cannot be amended). In addition, cooperative companies traditionally had a set of "internal regulations", adopted and changed by the board, not the general meeting, which contained rules complementing the articles of associations on such things as the powers and decision making procedures in the board and, importantly, the general meeting, often deviating from default statutory rules on these matters. The BCCA confirmed the possibility for the board of cooperatives to adopt a set of "internal regulations", similar to (but not exactly the same as) what in Delaware are called bylaws, and for the first time in the history of Belgian company law extended this possibility to NVs and BVs, but with so many restrictions (for BV and NV, not for the cooperative) on the board's powers and on what such a document could deal with, that this possibility to adopt "internal regulations" was perhaps not very useful (basically, it could mainly be

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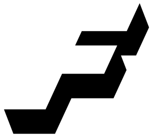

very useful and fraught with uncertainty; and the definition of those companies that are allowed to remain cooperatives is also very unclear.[182] For the last problem, policymakers cannot be blamed. The Ministry of Justice very sensibly wanted only firms that met the clear criteria to be a "recognized cooperative" to be allowed to take the cooperative form, but the influential cooperative lobby torpedoed this approach and subsequently failed to come up with a decent definition of what they saw as a cooperative.

The available statistics show that the vast majority of companies set up after the BCCA became effective are BVs, which is in conformity with the aim to turn the BV into the default company of choice.[183] However, this trend had begun before the reform, since the abolition of bearer shares for public companies. The reform does seem to have made incorporated partnerships largely superfluous, since BVs are about as flexible in the sense of open to contractual arrangements as partnerships while offering the benefit of limited liability. Statistics also show that at least in the first year after the reform, more private companies were set up than in the preceding years[184]. But the available statistics including this one have limited value, since it is

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used, in NV and BV, to issue some additional rules on the organisation of board meetings, but was not allowed to affect shareholder rights or the powers of the board or general meeting). The Constitutional Court ruled that the distinction made in the BCCA between internal regulations in cooperatives (Art. 6:69 § 2 BCCA) and in other corporations (Art. 2:59 BCCA), was a violation of the equality clause of the Constitution and surprisingly -and hard to defend- also ruled that NV and BV should get the same possibilities to adopt this type of "bylaw" as cooperatives, where "internal regulations" are for instance, lawfully, used to determine other majority requirements for votes at the general meeting than provided for in statute and, importantly, contain the "real" rules on profit allocation between partners in law firms and other consultancies that had organized themselves as cooperatives: GwH (= Belgian constitutional court) 15 October 2020, nr. 135/2020. So far the legislator has not intervened to come up with a new approach, but this is expected to be part of the "repair act" which will hopefully be adopted in 2024.

[182] See E. CALLENS and L. DE MEULEMEESTER, "De coöperatieve vennootschap 2.0: verankering van de coöperatieve gedachte of wedergeboorte van de oneigenlijke coöperatieve?", *TRV-RPS* 2020, (5) 7-12.

[183] See C. VAN DER ELST, De invloed van het nieuwe WVV op het vermogen, de aandelenstructuur en de aandelenoverdracht van en bij BV's: Een empirisch onderzoek" *TRV-RPS*, 2020, 349-361: in the May-November 2019 period, 96.2% of newly incorporated companies were BVs (with further references to research on this by the Belgian federation of Notaries, which also pointed out that in general after the reform, far more companies were set up than before. But their research only pertained to the first year after the reform, so it is not clear yet whether this is lasting phenomenon).

[184] Van der Elst shows that while in the 2015-2018 period, on average the total number of existing private companies increased with 8% year on year, 2019 saw a 24% increase of the number of BVs, and most of this was due to incorporations after the BCCA had become effective on May 1 2019. See C. VAN DER ELST, "De invloed van het nieuwe WVV op het vermogen, de aandelenstructuur en de aandelenoverdracht van en bij BV's: Een empirisch onderzoek" *TRV-RPS*, 2020, at 354. There clearly was quite a bit of "pent up demand", and it would be wrong, I think, to without further research

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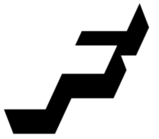

very likely that people who could afford to wait, at least in the year before the reform, waited until the new law became effective to set up a company, and in the two years after he BCCA became effective, the COVID epidemic had such a distorting effect on the economy that comparisons with the years immediately preceding the reforms do not make sense.

If one of the aims was to turn Belgian corporate law into an "expert product" -as I believe was the ambition of some politicians -then the reform failed in this respect. But as we explained, it was unrealistic to expect a reform of corporate law alone to create the attractive ecosystem, including a specialist judiciary, that can attract foreign entrepreneurs into a country's company law. Creating a better law for those firms that would have been subject to Belgian law in any case, is commendable in itself.

The possibility to introduce loyalty voting had two goals: the unspoken goal of allowing already existing controlling shareholders to cement their control on the cheap; and to convince start-up founders to take their companies public while retaining, through loyalty shares, control over companies after the IPO. The first goal was largely achieved, the second wasn't, probably because to achieve that, one probably needs real dual class shares -instead of everyone who meets certain conditions enjoying the doubling of their votes – and a multiplier higher than two. In spite of what some members of parliament who enthusiastically supported loyalty voting may have thought, encouraging long term thinking or, in other words, combating short termism, was never really an important goal of the reform in this respect.

In spite of all these positive elements, critics could argue that the BCCA is an example of fighting the last war. The BCCA was partly, but in large part, intended to make Belgian law "mean and lean, fit and proper"[185] to take part in the light vehicle competition which had arisen in Europe after 2006. But today a company law reform, even when limited to private companies, is not sufficiently ambitious when it simply wants to do away with inherited mandatory law that was not necessary to protect any type of stakeholder, and in addition wants to eliminate legal uncertainty created by old controversies on which no authoritative (i.e. from he court of cassation) case law was forthcoming, or reversing some undesirable case law. Today, a reform of the law of private companies should probably also be about actively catering to the capital and governance structures desired by venture capital and private equity

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interpret this spike as an indication that entrepreneurs found the BCCA reforms of the BV very attractive.

[185] To cite from the title of an article by Koen Geens in which he outlined some of his reform ideas while still an academic: K. GEENS, "Een nieuw wetboek van vennootschappen en verenigingen: lean and mean, fit and proper" in JAN RONSE INSTITUUT (ed.), *Quid leges sine cogitatione, enkele reflecties over vennootschapsrecht aangeboden aan Jean-Marie Nelissen Grade*, Kalmthout, Biblo, 2011, 90-102.

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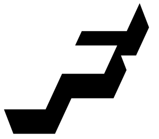

investors.[186] The BCCA reform contains some useful elements in this regard, such as the possibility to be far more creative than was allowed in the past in structuring voting and profit distribution arrangements and in increasing legal certainty about some aspects of shareholder agreements, while the few statutory rules on options, convertible securities and warrants probably do not get in the way of the desired and desirable contractual freedom at the disposal of parties to structure their deals. An example of a new rule that is useful for private equity contractors is that the new act now explicitly confirms that in both public and private companies, shares can either exclude the right of the holder to dividends, or the holder's right to a share in the company's liquidation surplus[187] (but not both).

But still, mainly for lack of time, the expert committee did not actively think about the needs of venture capital and private equity investors and did not pursue reforms intended to enable such deal structures and governance arrangements. In another example, the BCCA contains no attempts to actively enable novel techniques of raising capital. For example, it was well known to the expert committee that companies that want to use an accelerated bookbuilding procedure to quickly (e.g. within one or two days) sell shares in a private placement rights issue using synthetic pre-emption rights[188], are hindered by the past and present companies act rules on share issuance and especially the rules that require several reports, including by an external auditor, when a company wants to deviate from statutory preemption rights rules. But the committee took the quite conscious decision not to make life easier for such transactions by changing (and diluting) the rules on preemption rights.

By contracts, that the reform contains no traces of ESG considerations, is not something for which one can blame the reformers, since they were rightfully convinced that the companies act was not the right place to deal with ESG issues and, moreover, these issues only became prominent from 2018 onwards, when the draft bill had already largely been written.

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[186] On the types of contracts used in Europe, see e.g. the important study by P.GIUDICI, P. AGSTNER, and A. CAPIZZI "The Corporate Design of Investments in Startups: A European Experience" (October 14, 2022), available at: https://ssrn.com/abstract=4256344, as well as P. GIUDICi and P. ANGSTNER, "Start-ups and company law: the competitive pressure of Delaware on Italy (and Europe?), *EBOR*, Vol. 20, 2019, 597–632.

[187] In my opinion, this had always been possible in public companies, but some practitioners were more cautious, and the BCCA now explicitly confirms the possibility; for private companies, the former act outlawed such provisions, since it forbade classes of shares through the explicit statutory rule that all shares of a private company needed to give their holders exactly the same (profit and voting) rights.

[188] Meaning the company first applies the statutory procedure in order to be allowed to issue shares without taking preemption rights into account, but then voluntarily (practitioners prefer to talk about "synthetically") offers existing shareholders the possibility to exercise their preemption rights, but within a much shorter time-frame than the statutory rules provide for.

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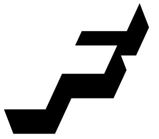

In a country like Belgium, where litigation produces too few precedents on controversial corporate law issues, not only was the 2019 reform overdue, but reform is probably a never-ending story: legislators need to intervene to make up for the lack of guidance by the courts[189]. Unfortunately, legislators too, until the 2019 BCCA reform, largely limited themselves to implementing EU Directives rather than adopting a pro-active approach. As the reform experience described in this article shows, even when you give a bunch of academics two or three years to come up with some new rules, they hardly have the time to be truly innovative. Then again, one of the mantras of business organisations representing SMEs[190] when the reform committee visited them to hear them out on the preliminary reform ideas was: "Please don't change the existing rules too much. Our member firms are aware that many corporate law rules are suboptimal, but they've learnt to live with them over the years and do not want changes simply because some academics would prefer more efficiency let alone a merely more logical-rational approach to issues". Authors and readers of articles like this one should never forget that corporate law, except for some basic rules on legal personality, limited liability and transferability of claims through shares- legal inventions without which large modern firms would be impossible to fund and organize- is largely trivial, in many respects [191].

[189] Why Belgium produces relatively little interesting corporate law court decisions compared to jurisdictions like the Netherlands or (much bigger) Germany, is unclear, though lack of trust in commercial court judges by firms and their shareholders is probably one factor, as is the overwhelming tendency of most judges to stick to black letter law and not be creative in their approach to questions.

[190] Such as VOKA and Unizo. The minutes of meetings between representatives of the Belgian Center for Company Law and such organisations (on file in my personal archive) would attest the veracity of the sort statement I will cite in the next sentence.

[191] See also (but partly from different angles than we have in mind here) B. BLACK, " Is Corporate Law Trivial?: A Political and Economic Analysis", 84 *Northwestern University Law Review*, *1990,* 542-597.

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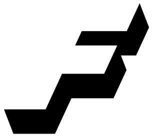

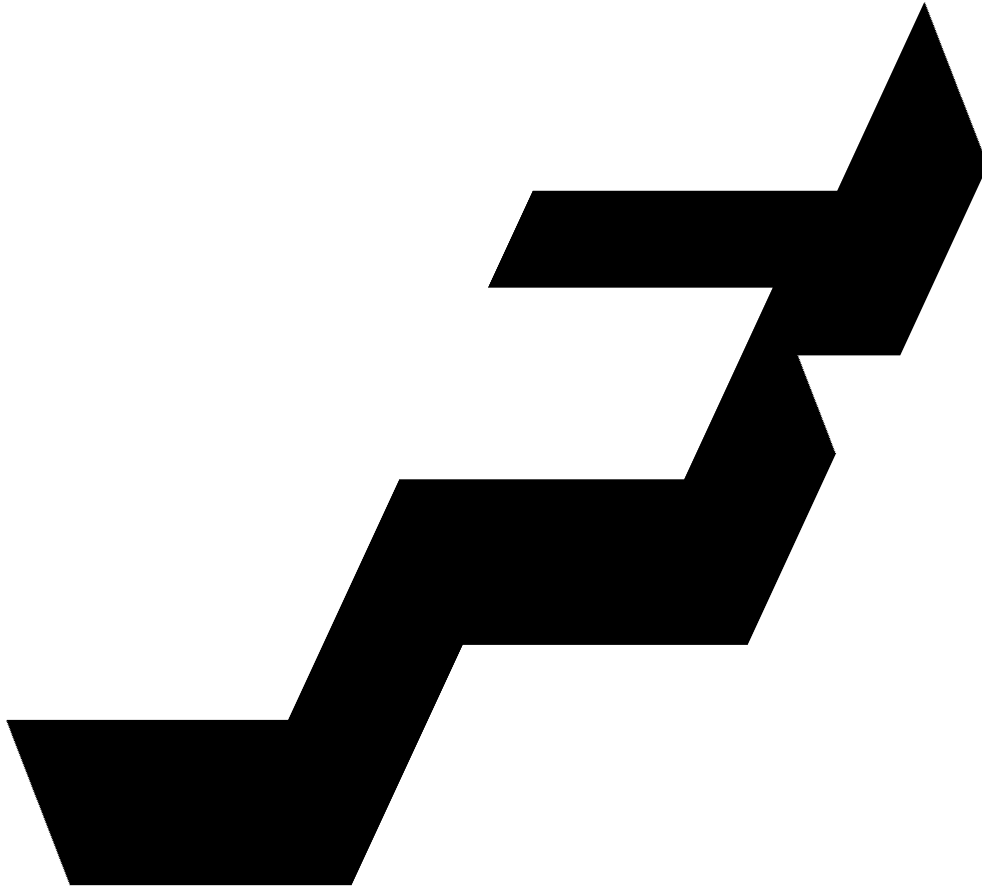

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