THE NEW GOVERNANCE RULES IN ACCORDANCE WITH THE BELGIAN CODE OF COMPANIES AND ASSOCIATIONS

INTRODUCTION

The new Code of Companies and Associations (hereinafter referred to as the 'CCA'), which replaces the old Belgian Code of Companies, came into force on 1 May 2019.

As of 1 May 2019, the CCA has been applicable to Belgian companies established as of 1 May 2019 as well as to existing Belgian companies which chose to 'opt-in' and therefore be subject to the CCA. Since 1 January 2020, the mandatory provisions of the CCA have been applicable to existing Belgian companies (i.e. companies established before 1 May 2019).

The existing Belgian companies, which did not 'opt-in' to the CCA will, in any event, need to align their articles of association with the CCA at the next amendment of their articles of association and at the latest by 31 December 2023.

One of the key changes implemented by the CCA relates to the corporate governance rules of Belgian companies. Some new provisions of the CCA are mandatory in nature, while other provisions offer new opportunities and allow shareholders and/or the management to decide whether or not to apply them.

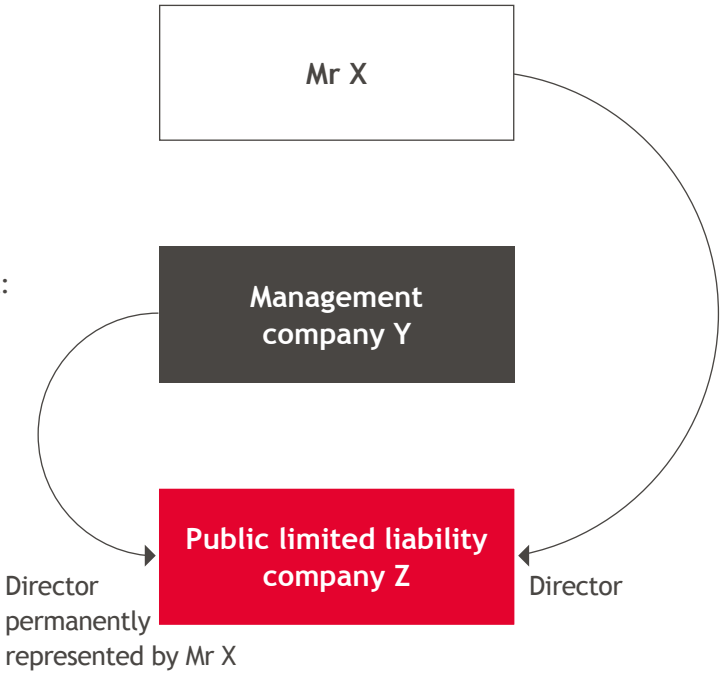
WHICH AMENDMENTS HAVE BEEN MADE REGARDING THE MANAGEMENT BODIES?

1 Prohibition on combining positions in management bodies (so-called principle of 'double seats') - mandatory law

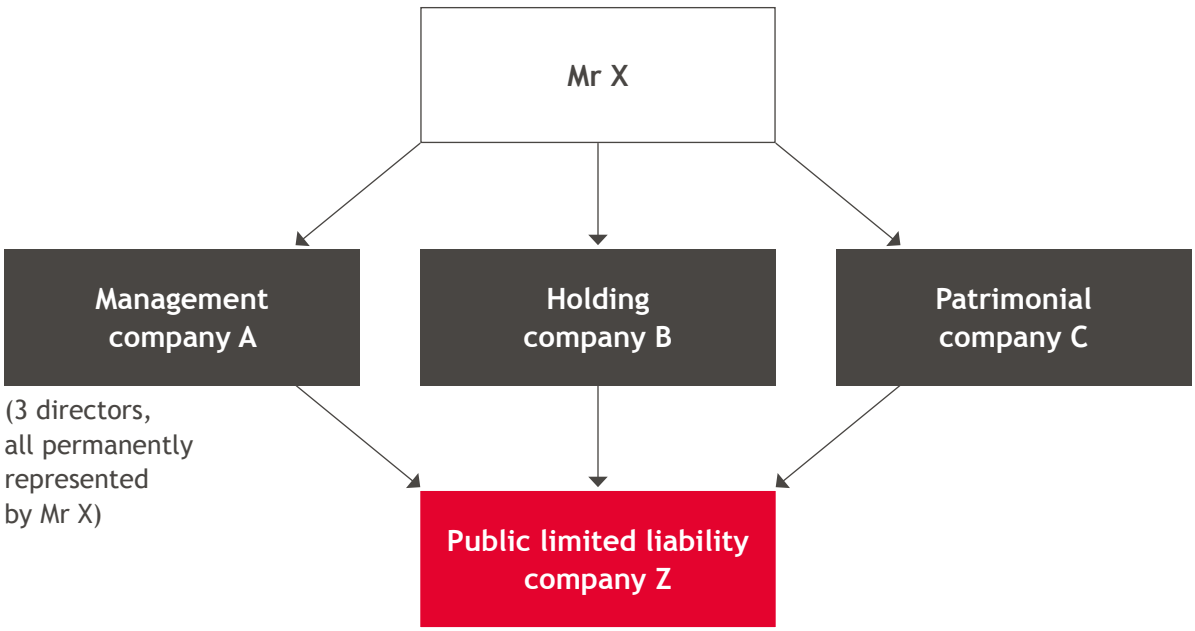
Since 1 January 2020, it is explicitly forbidden for one natural person to hold several positions in the management body of a Belgian company.

The following situations were common in the past:

i. A natural person was both a director (natural person) as well as a permanent representative for a legal entity, which was the director, of a management company. This situation mainly occurred in small public limited liability companies owned by less than three shareholders, in which two directors needed to be appointed on the grounds of the old Belgian Companies Code.



ii. The same natural person was the permanent representative of several directors, which were legal entities. This situation occurred mainly in groups of companies in which the majority shareholder played a prominent active role.

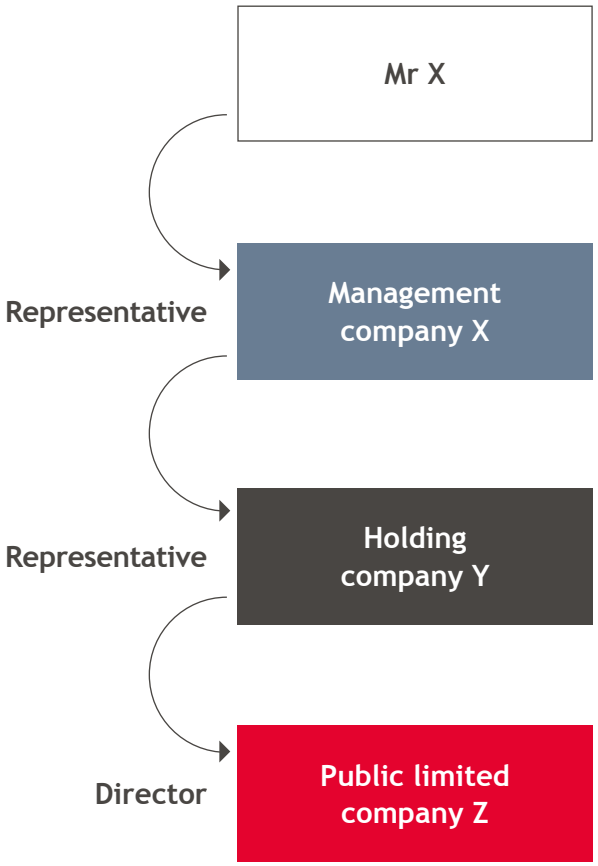


If, in practice, a certain person (natural person or legal entity) almost completely controls an entire public limited liability company or a group of companies consisting of public limited liability companies, it may from now on be worthwhile to opt for a sole director *(cf. infra 4. ii.)* to solve the problem of holding two or more positions simultaneously.

2 Prohibition of 'cascading' representational positions - mandatory law

As was the case in the past, any company that holds a mandate as a member of a management body (and, from now on, also as day-to-day manager) must appoint a natural person as its permanent representative.

Due to the fact that this was allowed by the old Belgian Companies Code, the following situation sometimes occurred in certain groups of companies: company Z appointed holding company Y as director, which in turn designated management company X as permanent representative, which in fine designated Mr X (natural person) to represent it. This situation often led to limitations with regard to choosing a permanent representative.



Under the new CCA, it has been made mandatory that only a natural person can be appointed as a permanent representative of a legal entity.

In groups of companies, it must therefore be verified that each legal entity exercising a director's mandate has actually appointed a natural person (and not another legal entity) as its permanent representative and that every natural person who holds a position in a management body holds only one single position (either as a director or as a permanent representative of a legal entity which has been appointed as director) *(see 1. above)*.

Based on the above, if this is not the case, an extraordinary shareholders' meeting will need to be convened as soon as possible to adjust the composition of the management body.

To facilitate the composition of the management bodies, the CCA no longer requires that the permanent representative of a legal entity must have a connection with the legal entity that he or she represents.

In the example on the left, holding company Y could directly appoint Mr X to represent it to hold the director's mandate of company Z, even though Mr X is neither a shareholder, director or employee of company Y.

3 Abolition of the executive committees - mandatory law

Article 524bis of the old Code of Companies allowed the management body of a SA/NV (public limited liability company) to transfer a part of its powers to an executive committee. This option has been abolished in the CCA, however, as long as the articles of association of the respective SA/NV have not been aligned with the CCA, the executive committees may continue to exist until 31 December 2023 (this day included).

However, from now on, it is important to already consider (i.e. to discuss the modalities of the executive committee members' new status with them) how the articles of association of the respective SA/NV must be adapted and how the company must function in order to take these new provisions into account.

In short, there are three possible options:

i. abolition of the executive committee and return to a management body that manages the company alone;

ii. option of dual management with a supervisory board and an executive board *(cf. infra 4.)*;

iii. establishment of an 'executive committee' made up of several managing directors, day-to-day managers, executives, etc. within a collegiate body.

4 New governance models in public limited liability companies

From now on, a public limited liability company can choose between three forms of management bodies:

i. Board of Directors (monistic governance):
A management body as we already know it (i.e. a collegiate body having at least three directors - or two if there are less than three shareholders - who are appointed for a maximum period of six years), where the only difference with the old Companies Code is that the management body may no longer transfer its powers to an executive committee. The management body may still establish several advisory committees in its midst in addition to the audit and remuneration committees that must be established in listed companies.

ii. Sole director (monistic governance):
Natural person or legal entity which exercises all the management and representative powers of the SA/NV alone. This possibility needs to be included in the articles of association.

The sole director can be appointed in the articles of association. In this case, the articles of association will need to be amended in order to dismiss the sole director. Moreover, the successor can also be appointed in the articles of association.

The sole director can be granted a right of veto for certain decisions of the shareholders' meeting (e.g. amendment of the articles of association, distribution to shareholders or its own dismissal).

The sole director of an SA/NV can therefore be compared to the former limited partner of a limited partnership (SCA/Comm. VA). However, there is one important difference: the limited partner was jointly and severally liable for the obligations of the SCA/Comm. VA, whereas that is optional for the sole director.

iii. Dualistic governance:
In the dualistic governance, the powers of the management body are shared between:

a. a supervisory board consisting of minimum three members appointed by the shareholders for a maximum of six years. The supervisory board is competent for the company's general policy, certain assignments that are specifically reserved to the supervisory board, and the supervision of the executive board. As is the case with the management body in the monistic system, the supervisory board may establish one or more advisory committees from among its members, and

b. an executive board consisting of at least three members appointed by the supervisory board. The executive board exercises all managerial powers that are not reserved for the supervisory board under the latter's control.

It is important to stress that one person is not allowed to be a member of both bodies. The establishment of a dualistic system therefore requires that at least six different persons be appointed.

5 'Ad nutum' revocability

In the past, 'ad nutum' revocability, i.e. the authority of the shareholders' meeting to dismiss a director at any time without justification, notice period or compensation, was a public policy rule. This is a supplementary rule from now on, meaning that the articles of association can provide otherwise. If nothing has been determined in the articles of association, the 'ad nutum' revocability will be the rule.

As mentioned above, in private and cooperative companies, the articles of association can now provide that directors be given a notice period or be paid compensation if their mandate is terminated. Such period or compensation can also be determined by the shareholders' meeting that appoints the respective directors or even by the shareholders' meeting that terminates their mandate if the articles of association do not foresee otherwise.

The regulations for public limited liability companies are slightly different. The notice period and compensation can be provided for in the articles of association or decided by the shareholders meeting that terminates the mandate, but not by the shareholders' meeting that appoints the director in question.

A director can, in any event, always be dismissed without notice or compensation for a well-founded legal reason.

6 Conflicts of interest - mandatory law

Without going into detail, it is useful to stress that the conflict of interest procedure has been adapted to the new forms of management bodies as mentioned above.

In case a director has a direct or indirect interest of a proprietary nature that is in conflict with the interests of the company, said director must inform the other directors of this and, moreover, the director involved may not participate in the deliberations or vote on this matter. Until now, this ban only concerned companies that made a public appeal to savings.

The rules on conflicts of interests applicable to directors must also be observed by the permanent representatives who exercise a mandate for a legal entity.

7 Delegation of the daily management

Private companies (SRLs/BVs, i.e. ex-SPRLs/BVBAs) have not undergone any real major changes with regard to their management. However, there is one important new aspect. The management body of the SRL/BV now has the option of assigning the day-to-day management of the company to one or more persons, who will have the authority to act individually, jointly or as a collegiate body.

As it was not previously possible to transfer the day-to-day management of a SPRL/BVBA, in practice, the management body often used ad hoc transfers of authority to achieve the same result. From now on, the SRLs/BVs, like the SAs/NVs, will be able to use this mechanism.

Moreover, the CCA has introduced a definition of day-to-day management which provides more legal clarity (and also applicable to SAs/NVs). It reads as follows: "The day-to-day management comprises both the acts and the decisions that do not go beyond the needs of the day-to-day life of the company, and the acts and decisions that, either because of their lesser importance, or due to their urgent nature, do not warrant the intervention of the management body." This definition is much broader than the one previously provided by the Court of Cassation.

8 Prohibition of employment contracts for directors, supervisory board members and executive board members

The CCA explicitly prohibits directors, supervisory board members and executive board members from being employed by an employment contract with respect to their mandate of director, supervisory board member or executive board member.

Although the old Belgian Code of Companies did not make a clear statement in this regard, the principle of 'ad nutum' revocability of a director's mandate already prevented the position of director of a SA/NV from forming the subject, as such, of an employment contract.

The same conclusion could be drawn from the Royal Decree No. 38 of 27 July 1967 on the establishment of the social status of self-employed persons, according to which the exercise of a mandate in a company is refutably presumed to be a self-employed professional activity.

Conversely, however, there is nothing to prevent these persons from being employed by the company by means of an employment contract for positions other than those relating to the management of the company, as was previously also the case. To this end, the following three conditions must be met:

i. Directors, supervisory board members or executive board members must hold an administrative, technical or sales position within the company which is independent of their mandate relating to the management of the company;

ii. Companies must be able to effectively exercise authority over their directors, supervisory board members or executive board members when these persons are working as the holders of positions that are independent of their mandate relating to the management of the company; and

iii. Such separate positions which are held in a subordinate context must be remunerated. The payment of remuneration is, after all, an essential element of an employment contract.

To the extent that this was necessary, the NSSO recently confirmed in its Instructions to Employers (2019/3) that it is possible to simultaneously perform activities as a director and employee within the same company if there is a clear distinction between the positions.

In that case, however, double subjection to the social security scheme for employees and self-employed persons shall apply, unless the mandate is unremunerated (either in the articles of association or in a decision made by the shareholders' meeting), and such unremunerated nature is also observed in practice. In this regard, it must be noted that, from now on, there is a legal presumption according to which a director's mandate and a supervisory board member's mandate is remunerated, unless there is a provision to the contrary in the articles of association or the shareholders meeting deciding otherwise.

Just as was the case under the old Belgian Companies Code, the CCA has not clarified whether the day-to-day management of a company can be performed within the scope of an employment contract. Provided it can be proved that there is a subordinate relationship, this should in principle still be possible.

The legal qualification of the employment relationship with the directors of non-profit associations is not covered either by the CCA. However, one can still refer to the extension of the subjection to social security for employees in the case of persons whose principal activity consists of the day-to-day management or management of associations or organisations that are not engaged in industrial or commercial activities and that do not aim to achieve material profit for their members, which persons are remunerated for their services in a manner other than with room and board.

CONCLUSION

The CCA provides many new opportunities.
This is the ideal occasion to align your company operations with your needs, your situation or your shareholder structure.

Plenty of time until 31 December 2023?
We recommend that you adapt your articles of association as soon as possible to avoid interpretation problems that might result in a conflict between your current articles of association and the CCA.

The articles of association must in any event be aligned with the provisions of the CCA in case of any amendment to the articles of association after 1 January 2020 (such as an amendment of the corporate object, capital increase, merger or demerger).

LEGAL ASSISTANCE BY BDO LEGAL

Our legal experts specialised in company law can advise you.

- We can help you **identify the opportunities provided by the CCA** that meet your needs;
- We can help you **establish a new governance policy** that is in line with both your company's needs and the new CCA;
- We can **guide you throughout the entire adjustment process** (preparing statutory reports, rewriting the articles of association, liaising with the various stakeholders as well as with accountants, auditors, notary publics, banks, etc.);
- Taking into account the specific activities of a director, supervisory board member or executive board member, we can **advise** you to which social security regime he or she must be subjected.

Interested?

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