LEGAL ASPECTS OF STARTING A COMPANY
STARTER SEMINAR
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I. HOW TO START A COMPANY/COMMERCIAL ACTIVITY FROM A LEGAL PERSPECTIVE
DIFFERENT OPTIONS TO SET UP AN ECONOMIC ACTIVITY

As a **physical person**
- One (or more) person(s) business
- Factual association (*Feitelijke vereniging*)

As a **legal entity**
- Legal entity – not a company
- Company
Most easy way to start-up a business

No “capital” requirements, no reporting obligations

Limited administrative obligations and a simplified bookkeeping

But unlimited liability! (no distinction between personal belongings and the assets and liabilities of the business)
ADMINISTRATIVE FORMALITIES TO SET UP A FACTUAL ASSOCIATION

- No legal requirements

- Advisable to agree on way of cooperation (cfr. association; umbrella association?) and to enter into a good insurance
✔ Open an account in the name of the business
✔ Request a number to the trade register (Crossroads Bank for Enterprises)
✔ Request the activation of the VAT number
✔ Join a social fund for self-employed persons (Sociale kas voor zelfstandigen)
✔ Join a Health Care Service (Ziekenfonds)
• Non profit sector

• Oral or written contract between 2 or more persons in which they agree to cooperate for a non profit purpose

• But: no separate legal personality, no separate assets, liabilities and rights -> unlimited liability

E.g. sport club, student group, carnival group
OLD VS. NEW CODE ON COMPANIES AND ASSOCIATIONS

The Belgian Code on Companies and Associations came into effect on 1 May 2019 (the BCCA).

One of main goals - reductions of corporate forms!

**Remaining** corporate forms:

1. Private Partnership (*Maatschap*)
2. General Partnership (*Vennootschap onder firma - VOF*)
3. Limited Partnership (*Commanditaire vennootschap - CommV*)
4. Private Limited Company (*Besloten vennootschap - BV*)
5. Public Limited Company (*Naamloze vennootschap – NV*)
6. Cooperative Company (*Coöperatieve vennootschap – CV*)
7. European Company (*SE*)
8. European Cooperative Company (*SCE*)

**Abolished**: silent partnership (*stille vennootschap*), special partnership (*tijdelijke vennootschap*), agricultural company (*landbouwvennootschap*), economic interest grouping (*economisch samenwerkingsverband*) and limited partnership with share capital (*commanditaire vennootschap op aandelen*)
TRANSACTION PERIOD

1 May 2019

Opt-in Option

- Companies may decide to apply the new CCA (earlier than as from 1 January 2020) by amendment of AoA
- No “cherry-picking”

1 January 2020

4 years transitory regime

- Upon first amendment of AoA, alignment with BCCA
- Exceptions: use of authorized capital, conversion of convertible bonds or issuance of shares upon exercise of subscription rights

1 January 2024

End of 4 years transitory regime

End 2018

Adoption of the new Belgian Code for Companies and Associations ("BCCA")

Key Reference Date

Action

No new companies can be established under the old rules or converted into a form that has been abolished

BCCA is applicable to existing organisations (subject to transitory regime)

Direct application of mandatory rules, even if AoA have not been amended

BCCA is applicable to existing organisations (subject to transitory regime)

Entry into force

AoA to be aligned with BCCA

Sanctions: Directors’ liability

Automatic conversion of abolished companies
NO LEGAL PERSONALITY

NO DISTINCTION BETWEEN ASSETS AND LIABILITIES

IF PRIVATE PARTNERSHIP / FACTUAL ASSOCIATION CANNOT MEET ITS OBLIGATIONS

Private partnership (*Maatschap*)

*Pro memorie*: Factual association (*Feitelijke vereniging*)
LEGAL PERSONALITY

SHAREHOLDERS OR MEMBERS

- Private Limited Company (BV)
- Public Limited Company (NV)
- Limited partnership (CommV)
- General partnership (VOF)
- Non profit association (VZW)
- Cooperative Company (CV)
Distinction between profit and non-profit legal entities:

- Non-profit
  - non-profit associations (*vereniging*), foundation (*stichting*)

- Profit
  - Companies
    - with limited liability
    - with unlimited liability
Advantages of a legal entity:
- Possibility to limit your liability
- Separate assets and liabilities (= legal personality)

Disadvantages of a legal entity:
- Administrative more burdensome
- Annual reporting requirements
- Bookkeeping
- Ultimate Beneficial Owner (UBO) identification
- At least 2 actual members (optional: participating members)

- Written agreement to be signed in at least 2 originals by all members

- Written agreement contains the articles of association (minimum requirements in the BCCA)

- Meeting of members – board of directors and (optional) organ of daily management

- Main objective is non profit, but can develop commercial activities provided the proceeds are used for the non profit objective
Companies (justonweb.be)

Online possibility to set up a:

- non-profit association (VZW/ASBL)
- a general partnership (VOF/SNC)
- a limited partnership (CommV/SComm)
- a branch, by means of a private deed (previously ‘eGriffie/eGreffe’)

Further possibilities to:

- draw up articles of association by means of templates
- manage the fines your company has received, and identify the driver of a company car
- verify whether someone has been banned from being a company director
Decisions to take:
- Limited or unlimited liability
- One director, two directors or a board of directors (less important in BCCA)
- Capital or not
- Special agreements between shareholders or with managers
- Shares freely transferable (less important in BCCA)
**FOCUS ON NV/SA – BV/SRL**

**BV/SRL** = closed company (former BVBA/SPRL)
- follows the Dutch example
- for small undertakings
- no capital required
- shares can be freely transferred, if allowed by the articles of association
- flexible

**NV/SA** = open company
- for large undertakings
- minimum capital: EUR 61,500
- shares can be freely transferred, unless transfer restrictions in the articles of association

**CV/SC** for cooperative purposes
- only for true cooperative purposes (a lot of former cooperative companies had to convert to other legal forms; e.g. free professions, joint ventures)
No capital requirement

- shares are separate from capital
  - contribution no longer determines the rights attached to shares
- sufficient initial assets in light of the intended activity
  - taking into account other financing sources
  - justification in the financial plan
  - much more detailed financial plan
    - ‘sufficient’ initial assets to cover the intended activities for 2 years
    - minimum information stipulated in the BCCA
    - opening balance sheet and income statements for 2 years
    - name of an external expert that provides assistance to be included in financial plan
- **Contribution of cash**
  - to a special account, no obligation to pay-up at incorporation
- **Contribution in kind** (online incorporation not possible)
  - requires a report by the company auditor or statutory auditor (on the value) and a report by the founders/board
- **Contribution of services/industry (sweat equity) is allowed**
  - audit report required
  - death, declaration of incapacity or other unusual cause that renders performance impossible, the shares lapse
  - temporary incapacity of more than 3 months, suspension of the rights attached to the shares
Closed or open (transferability of the shares)

▸ Old rules are supplementary (non-mandatory) law (approval by at least half of other shareholders representing at least three quarters of voting rights) -> closed
▸ Articles of association can provide otherwise -> open

Freedom of securities

▸ Rights may be freely determined; but one share with one vote
  ▸ in the absence of other rules, a share entitles its holder to one vote
  ▸ multiple voting rights
▸ Convertible bonds and subscription rights
Incorporation

- Financial plan (~ BV/SRL)

Transfer of shares

- In principle freely transferable, unless transfer restrictions in the articles of association
Strict capital rules (protection of creditors) – min. EUR 61,500

Distinction between subscribed and paid up capital

- Subscribed capital = amount mentioned in the Articles of Association for which there is a payment undertaking of the shareholders
- Paid-up capital = amount of the subscribed capital effectively paid to the company (min 1/4th and issue premium and at least EUR 61,500)
• Contribution in cash
• Contribution in kind

No contribution of services/industry possible
Voting rights

- Voting rights proportionate to capital is non-mandatory (waivable) law under the BCCA -> multiple voting rights are possible
- Limited in listed companies
  - double voting rights
  - only for loyal shareholders
Freedom of securities

- Rights may be freely determined; but one share with one vote
  - in the absence of other rules, a share entitles its holder to one vote
- Profit shares (no contribution)
- Convertible bonds and subscription rights
INCORPORATION OF A BV/SRL OR NV/SA

- Draft financial plan
- Draft articles of association
- Wire amount of minimum capital to a blocked account -> bank certificate (if applicable for BV/SRL)
- Bank certificate, financial plan, identification of the incorporators and the directors to be sent to the notary
- Notary draws up notary deed
- Go to notary to enact the notary deed (or online meeting since 1/8/2021) or give a POA
- Notary registers the notary deed, files a copy at the clerk’s office of the commercial courts and takes care of the publication in the Annexes to the Belgian State Gazette
- Notary provides the registration number in the Crossroads Bank of Enterprises (not VAT number)
- Request a registration number to the trade register (Crossroads Bank of Enterprises)
- Request the activation of the VAT number
- Join a social fund for self-employed persons
- Join a health care service
- Register at the UBO register
INCORPORATION OF A BV/SRL OR NV/SA
ONLINE INCORPORATION

- Since 1 August 2021
- Set-up by the Chamber of Notaries
- https://startmybusiness.be/over-startmybusiness/?lang=en
II. HOW DOES A COMPANY WORK?
General meeting of shareholders (GM)

Board of directors/ Director(s)

Organ of daily management:
Person in charge of the daily management (only daily management)
Managing director (daily management and director's mandate)

Special proxy holders
(no organ)
• **Board of directors**
  ▶ one or more directors, whether or not in a board, also for daily management
    ▶ remuneration and removal determined by GM (at all times, unless otherwise determined or decided)
    ▶ can be appointed in the articles of association (statutory director)
      ◦ removal requires amendment to the articles of association (in addition approval by director of the amendment of the articles of association is possible)
  ▶ permanent representative of a legal entity is a natural person

• **Person in charge of daily management**
In listed companies: audit and remuneration committees appointed from members of the supervisory board.

Watch out: in certain regulated companies other (corporate governance) rules apply.

The directors may do whatever is necessary and useful for the realisation of the object of the Company, except those matters explicitly reserved to the GM.

- strategy, reserved powers (statutory powers of the board of directors), supervises the management board
- appointed by GM

- collective body
- at least three members
- appointed by the supervisory board
- compensation and discharge determined by the supervisory board
- general representation

- Independent boards
- Members cannot sit on both boards
- Exclusive powers
- Management committee abolished

NV/SA

One-tier

Board of Directors

Supervisory Board

Management Board

Two-tier
• **Management by a sole director**

  ▶ A successor to the director may be appointed in the articles of association (e.g. create dynasties)
  ▶ The articles of association may stipulate that the director has joint and several unlimited liability for the company’s obligations
  ▶ The articles of association may stipulate that the director must agree with each amendment to the articles (see also earlier “statutory director”)
  ▶ In listed companies (or when the law requires collective management) the sole director must be an NV/SA with a collective board

**Daily management** described in the BCCA accordance with the literature:

▶ A few times every year
▶ Of minor importance
▶ Urgent
POWERS OF THE SHAREHOLDERS MEETING VS THE BOARD VS MANAGEMENT

- **Shareholders’ meeting**: only those powers expressly reserved for the shareholders meeting in the BCCA or Articles of Association – reserved powers
  - Appointment/dismissal directors and statutory auditor
  - Approval annual accounts and allocation of result
  - Granting discharge to directors and statutory auditor
  - Changes to AoA
  - Actio mandati
  - Liquidation and dissolution of the company
  - Decision to purchase own shares
  - (De)merger, etc.
  - Issuance of securities
  - Conversion

- **Board of directors or directors**: all powers not reserved for other organs – residual power

- **Management**: possible to grant daily management power and/or other PoA’s
• A company should act via its organs (but can only act via its organs)

• Acts are imputed to the company (as if the organ does not exist)

• The person that is competent to take the decision is not necessarily the person who can represent the company for the execution of a decision

• Decision power: see previous slides

• Power to represent the company: determined by the articles of association, if not by the majority of the members of the board of directors
3 types of shareholders’ meetings:

▶ **Annual shareholders’ meeting**
  - Yearly at the date mentioned in the articles of association
  - Approval of the annual accounts, allocation of profit/loss, discharge of the directors/managers

▶ **Extraordinary shareholders’ meeting**
  - A shareholders’ meeting in front of the notary (e.g. amendment of articles of association, capital increase/decrease, merger, demerger, dissolution)

▶ **Special shareholders’ meeting**
  - Rest category (e.g. appointment and dismissal of directors, auditor if not at the annual shareholders’ meeting)
Dividend distribution

- **Net asset value test**: no distribution if the net asset value would become negative
  - net asset value = total assets, (usually) with the exclusion of capitalised costs, less reserves and debts
    - determined on the basis of the last approved financial statements or a more recent statement of assets and liabilities
  - in the case of unavailable reserves, net assets cannot fall below this amount

- **Liquidity test**: guarantee by the board that debts can be paid as and when they become due and payable “according to reasonably foreseeable developments” for a period of 12 months from the distribution – calculation of quick ratio
  - board must provide a justification in its report
  - auditor examines the accounting and financial data in the report and states in the audit report that it has done so
  - no publication

- **Power of the shareholders’ meeting**
  - at all times
  - carried-forward profits or reserves
Distributable profits

- Net asset value is determined based on the last approved financial statements
  - net asset value = total assets, (usually) excluding capitalized costs, less reserves and debts

- Power of the shareholders’ meeting
  - at all times
  - carried-forward profits or reserves
INTERIM DIVIDENDS
BV/SRL AND NV/SA

Board decision
- Only if provided for in Articles of Association
- No longer any time limits
  - thus e.g. each quarter is possible
- From profits from the current financial year, but also from profits from the preceding financial year until approval of the financial statements
  - increased or decreased by carried-forward profits or losses
  - but no impairment of statutory or other reserves
- Board must determine, based on the audited statement of assets and liabilities, that the profits are sufficient
  - the auditor’s verification shall be appended to the audit report
  - Attention: double test for the BV/SRL!
### LIABILITIES OF THE COMPANY

- **Shareholders**: in principle not in the BV and NV (but watch out: e.g. *de facto* director)

- **Directors**: legal grounds
  - Bad management
  - Non compliance with the BCCA or the articles of association
  - Faults committed under the general extra-contractual regime or for criminal law infringements
  - Additional liability in the event of bankruptcy, alarmbell procedure, non filing of the annual accounts, ...

- **Organ of daily management**: legal grounds

- **CAP**

<table>
<thead>
<tr>
<th>Cap (EUR)</th>
<th>Average turnover (EUR excluding VAT)</th>
<th>AND/OR</th>
<th>Total of the balance sheet (EUR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>125,000</td>
<td>&lt; 350,000</td>
<td>AND</td>
<td>≤ 175,000</td>
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<tr>
<td>250,000</td>
<td>&lt; 700,000</td>
<td>AND</td>
<td>≤ 350,000</td>
</tr>
<tr>
<td>1,000,000</td>
<td>&lt; 9,000,000</td>
<td>OR</td>
<td>&lt; 4,500,000</td>
</tr>
<tr>
<td>3,000,000</td>
<td>Between 9,000,000 and 50,000,000</td>
<td>AND</td>
<td>Between 4,500,000 and 43,000,000</td>
</tr>
<tr>
<td>12,000,000</td>
<td>&gt; 50,000,000</td>
<td>OR</td>
<td>&gt; 43,000,000</td>
</tr>
</tbody>
</table>

- **No cap** (i) in cases of minor fault which is habitual rather than accidental, of serious fault, of fraudulent intent or intent to harm on the part of the person to be held liable (ii) in case of a number of liability grounds specifically mentioned in the BCCA
ANNUAL ADMINISTRATIVE FORMALITIES

- Bookkeeping (double-entry)
- Closing of the financial year -> draft annual accounts
- Drawn up by the board of directors (together with the annual report)
- Check by the statutory auditor, if any
- Shareholders’ meeting should be convened within 6 months following closing of the financial year (in principle at the date provided in the articles of association) to approve the annual accounts
- Filing of the annual accounts with the National Bank (within 30 days following approval by the shareholders’ meeting)
- Penalties in case of belated filing (supplementary filing fee, ex-officio deletion from CBE, civil sanction and judicial dissolution)
- Confirm registration at UBO register
• Board of directors/directors should meet at least 1x per year (draft annual accounts)

• Shareholders’ meeting should meet at least 1x per year (approval annual accounts)

• Minutes must be kept of the meetings of the board of directors and shareholders’ meetings (not “report”, but minutes)

• Watch out: location where “most” board meetings are held, may have tax implications
• Automatic winding-up (ontbinding van rechtswege): fixed duration in the articles of association or achievement of the corporate purpose

• Winding-up due to termination (ontbinding ingevolge opzegging): declaration by one or more partners in general or limited partnerships for indefinite duration

• Merger or demerger (fusie of splitsing)

• Voluntary liquidation (vrijwillige ontbinding)

• Judicial liquidation (gerechtelijke ontbinding)

• [Bankruptcy (faillissement)]
THANK YOU! QUESTIONS?

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