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

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 of the business)
Open an account in the name of the business
Request a number to the trade register (Crossroad Bank of 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)
Physical Person - Factual Association

- 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
Limited Liability Company

VZW/ASBL

LEGAL PERSONALITY

SHAREHOLDERS OR MEMBERS
LEGAL PERSONALITY

NO DISTINCTION BETWEEN ASSETS AND LIABILITIES

IF FACTUAL ASSOCIATION CANNOT MEET ITS OBLIGATIONS

Factual association = members
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
Distinction between profit and non profit legal entities:

- **Non profit**
  - non profit associations, foundation

- **Profit**
  - Companies
    - with limited liability
    - with unlimited liability
LEGAL ENTITIES: ADVANTAGES/DISADVANTAGES

Advantage of a legal entity:

▶ Possibility to limit your liability
▶ Separate rights and liabilities (= legal personality)

Disadvantage of a legal entity:

▶ Administrative more burdensome
▶ Annual reporting requirements
▶ Bookkeeping
▶ Ultimate Beneficial Owner identification
NON FOR PROFIT ASSOCIATION ((I)VZW/A(I)SBL)

- 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 Company Code)
- Meeting of members – board of directors and (optional) organ of daily management
- Main objective is non for profit, but can develop commercial activities provided the proceeds are used for the non for profit objective
RULES APPLICABLE TO LIMITED LIABILITY COMPANIES

• New Company Code (CC) since 1 May 2019
• Important changes compared to former regime
TRANSITION PERIOD

Key Reference Date

End 2018

1 May 2019

Entry into force

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

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 CCA
  • 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

Expected adoption of the new Belgian Code of Companies and Associations ("CCA")

Action

1 January 2020

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

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

1 May 2019

1 January 2024

End of 4 years transitory regime

AoA to be aligned with CCA

Sanctions: Directors’ liability

Automatic conversion of abolished companies
WHICH TYPE OF COMPANY TO CHOOSE?

Decisions to take:

- Limited or unlimited liability
- One director, two directors or a board of directors (less important in CC)
- Capital or not
- Special agreements between shareholders or with managers
- Shares freely transferable (less important in CC)
BV/SRL = closed company (former BVBA/SPRL)
- follows the Dutch example
- for small undertakings
- no required capital
- shares can be freely transferred, if allowed by the articles

NV/SA = open company
- for large undertakings
- Minimum capital: EUR 61,500

CV/SC for cooperative purposes
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
    - minimum information stipulated in the law
    - 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
  ▶ 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 -> closed
- articles 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
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 will become non-mandatory (waivable) law - 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 Crossroad Bank of Enterprises (not VATnumber)
- Request a registration number to the trade register (Crossroad 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
II. HOW DOES A COMPANY WORK?
BV/SRL

General meeting of shareholders (GM)

Board of directors/ Director(s)

Organ of daily management:
- General manager (only daily management)
- Managing director (daily management and director)

Special proxy holders
(no organ)
MANAGEMENT OF THE BV/SRL

• 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
      • removal requires amendment to the articles
  ▶ 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

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

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

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- independent
- cannot sit on both organs
- exclusive powers
- management committee abolished
MANAGEMENT OF A NV/SA

• Management by a sole director
  ▶ a successor to the director may be appointed in the articles
  ▶ the articles may stipulate that the director has joint and several unlimited liability for the company’s obligations
  ▶ the articles may stipulate that the director must agree with each amendment to the articles
  ▶ 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 accordance with the literature

▶ A few times every year
▶ Of minor importance
▶ Urgent
• Shareholders’ meeting: only those powers expressly reserved for the shareholders meeting in the Company Code or Articles of Association – reserved powers

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

• Management: only reserved powers/daily management
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

- **Annual shareholders’ meeting**
  - Yearly at the date mentioned in the Articles of Association
  - Approval of the annual accounts, 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, split)

- **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
  - 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 GM**
  - at all times
  - carried-forward profits or reserves
DIVIDEND DISTRIBUTION IN THE NV/SA

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 GM
  - at all times
  - carried-forward profits or reserves
Board decision

- 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
- Directors/managers: legal grounds
  - Bad management
  - Non compliance with the company code or the Articles of Association
  - Additional liability in the event of bankruptcy, alarmbell procedure, non filing of the annual accounts, ...

- Members of the management board: idem as directors
- Organ of daily management: legal grounds
ANNUAL ADMINISTRATIVE FORMALITIES

- Bookkeeping (double-entry)
- Closing of the financial year -> draft annual accounts
- Drawn up by the board of directors/managers (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)
- Confirm registration at UBO register
MEETINGS OF THE ORGANS OF THE COMPANY

- Board of directors/directors should meet at least 1x per year (draft annual accounts)
- Shareholders’ meeting should meet at least 1x year (approval annual accounts)
- Minutes must be kept of the meetings of the board of directors and shareholders’ meetings (not “report”, but minutes-
END OF THE COMPANY

- Fixed duration in the Articles of Association or achievement of the corporate purpose
- Merger or split
- Voluntary liquidation
- Judicial liquidation
- Bankruptcy
Het denken onderwerpt zich niet.