Chapter 1
The Third Sector in Belgium

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Contents

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Abstract The third sector has existed in Belgium for a long time, even if it is not generally referred to by this term. It has always found legal structures to develop its activities and to foster its prosperity. This chapter shows how, starting from a rigid distinction between companies and associations, structures more adapted to the social economy or third sector have gradually emerged. Most of the chapter is devoted to the consequences of the reforms of 2018 and 2019, which have reshaped the law of enterprises, companies and associations. There is now a wide range of structures that can host social economy activities. These can be non-profit associations, which may engage in any economic activity, companies, which need not be only devoted to the enrichment of their shareholders, or cooperative companies, which can receive an accreditation in recognition of their specificities.

1 Introduction

The term 'third sector' is not commonly used in Belgium, but the reality it refers to is not unknown. During the nineteenth century, society evolved to be organised into 'pillars' (catholic, liberal and socialist), each of which consisted of institutions and organisations such as political parties, youth movements, mutual health organisations, trade unions, banking and insurance cooperatives, education networks, etc. All of these interacted with both civil society and the public authority. Although this system has evolved over time and is now largely outdated, there are still traces of it and there is a significant presence of actors on the borderline between business, functional public service and non-profit organisations.

Despite its importance, this sector has not benefited from a uniform and coherent regulation. There are, of course, many regulations specific to each particular activity, which will not be discussed in this chapter. Apart from that, the initiatives taken to grant some form of recognition or status to this sector—whatever its exact limits or definition—have remained *ad hoc* and have tended to be the fruits of legislative accidents rather than the result of a coherent policy. Nor have they achieved widespread social recognition: they involve a small number of actors (compared to the number they could potentially include), they do not last long before being abrogated or fundamentally modified, and they are hardly known to the public at large.

In practice, the third sector therefore uses a range of legal structures spreading over associations and company law. Although numbers vary according to the sources, the non-profit association is clearly, by far, the most commonly chosen social form for enterprises of the social economy.[1]

After giving a historical overview to understand the current rules (actions Sects. 2 and 3), this contribution will present how non-profit legal persons (Sect. 4) and companies (Sect. 5) can be used in the social economy. We will then outline the specificities of the cooperative company (Sect. 6).

2 Historical Background

2.1 *Summa Divisio* Between Companies and Non-profit Associations Prior to 1995

For a long time, the Belgian legal system either provided for instruments that were exclusively geared towards profit-making, or for purely non-profit purposes thereby theoretically ruling out any possibility for them to actively participate in the economy. The accredited cooperative company has been a notable exception since 1962 (see Sect. 6.2 below).

In this respect, our legal system was traditionally based on a *summa divisio* between commercial companies (*société commerciale – handelsvennootschap*) and non-profit associations (*association sans but lucratif – vereniging zonder winstoogmerk*).[2] Commercial companies were governed by the Napoleonic Code de Commerce and then later by the Lois coordonnées 'sur les sociétés commerciales' [Coordinated Laws on Commercial Companies] of 1935 (hereinafter, "CLCC"). Non-profit associations were only granted legal personality after World War I, when their functioning was organized by the Law of 27 June 1921 'sur les associations sans but lucratif' [concerning non-profit associations].

The intention was to maintain a strict divide between the activities that could be exercised by companies and associations. As we shall see, this rigid *summa divisio* evolved over time towards a more flexible approach to the activities and purposes of these legal forms.

Under the Code de commerce and later the CLCC, commercial companies were profit oriented. Article 1 CLCC provided that the purpose of a commercial company was to engage in commercial transactions (*actes de commerce – daden van koophandel*).

[1] De Gols and Leurquin (2020). These authors also provide valuable statistics on the social economy in Belgium, regarding, for example the size of enterprises, the level of employment, the economic sectors in which they are active, etc.

[2] Gol (2021).

Commercial transactions were those listed by articles 2 to 3 of the Code of Commerce (Code de commerce—Wetboek van koophandel). They include the sale of merchandise, factories and manufacturers, banking, exchange and finance activities, and many more. Those operations were presumed to be conducted with the intention of making profits.[3] Agricultural activities, medical and para-medical professions, legal professions, such as lawyers and notaries, etc. were not considered as commercial activities. This comes from an older tradition when these activities were deemed honourable for the upper classes and the nobility, were classified as civil activities and were supposed to be carried out without an intention of making profits.[4]

Commercial activities could be carried out by individuals or by companies. In the latter case, the commercial company was intended to pursue a commercial activity that would generate profits to be shared between its shareholders.[5] The common intention of the shareholders to seek and share profits was the very essence of a commercial company.

Until the end of World War I, non-profit associations were neither legally recognised nor regulated. The underlying reason was the government's fear that associations such as trade-unions, professional corporations, religious congregations or political associations could become powerful,[6] as well as the related concern that they could, over time, build up large estates without ever paying inheritance tax.[7]

It took 90 years for the freedom of association enshrined in the Constitution since 1831 to be implemented with the Law of 27 June 1921 concerning non-profit associations. This law provided that non-profit associations were forbidden (i) to exercise a commercial or industrial activity and (ii) to provide their members with any material gain (article 1 of the Law of 27 June 1921). They were thus supposed to pursue a "disinterested purpose" (*but désintéressé – belangeloos doel*), conceived as a social mission of charitable, educational, cultural, folkloric, sanitary or other nature, excluding the enrichment of the members. Moreover, this goal was to be realised without engaging in commercial or industrial activities.[8]

The possibility for a non-profit association to engage in an ancillary commercial activity was nonetheless foreseen by the preparatory legislative work and commonly admitted in practice,[9] provided that it was necessary for the achievement of its disinterested purpose and that the generated profits were solely allocated to the enhancement of this purpose (and not to the members of the association). However,

[3] Coipel (2020).

[4] Simonart (2016).

[5] Tilquin and Fanard (2008).

[6] Bogaert (2019).

[7] For more details about the historical developments, see Coipel and Davagle (2017).

[8] For more details about this definition and the numerous controversies that it generated, see Coipel and Davagle (2017).

[9] t'Kint (2013).

the definitions of "necessary" and "ancillary" and their practical implications generated intense controversy in doctrine and case-law, as well as abuses in practice.[10]

Many non-profit associations carried out commercial activities (almost) without any limit. This was a consequence of a judgment of the Court of Cassation in the case known as the "the priest's swimming pool",[11] linking the definition of commercial transactions to the intention of making profit. A priest operated a swimming pool as part of the parish activities. The Court ruled that this activity could not be qualified as commercial (although any other public swimming pool would be) because the priest did not seek to make profits but rather to serve his community. More generally, the Court held that the activities enumerated by articles 2 to 3 of the Code of commerce were presumed to be carried out with an intention of making profits. However, their commercial nature could be refuted in a particular case if it was established that they were not carried out with an intention of making profits. Since non-profit associations did not intend to make profits, it was nearly impossible to establish the commercial nature of their activities.[12]

This judgment of the Court of Cassation has been criticized because it led to legal uncertainty and, according to some authors, to discrimination between (i) the private for-profit sector on one side, and (ii) the private non-profit sector as well as the public sector, on the other side.[13] With this binary theory, the rules applicable to commercial actors were inaccessible to the private non-profit sector (i.e. social economy initiatives adopting the non-profit association form), even though they carried out the same activities.

2.2 Inadequate Legal Framework

This legal landscape proved to be somewhat ill-suited to the actors of the social economy sector who aspired to pursue a socially driven economic activity without the intention to make and distribute profits.

Indeed, legal uncertainty prevailed regarding the activities that non-profit associations could engage in. Without being able to precisely determine the meaning of "ancillary", social economy initiatives adopting the non-profit association form and pursuing a commercial activity other than ancillary constantly faced the risk of judicial dissolution (article 18 of the Law of 27 June 1921), and their directors the risk of being held liable. Furthermore, non-profit associations typically had poorer access to bank loans.[14]

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[10] Garroy (2021).

[11] Cass. (1973).

[12] Thirion (2010).

[13] Thirion (2010).

[14] Lemaitre (1996).

Moreover, insofar as the core purpose of a commercial company is to seek and share profits, it could not be validly constituted for other purposes (including social purposes), and it could not validly act selflessly (make donations, for example).[15] Legal acts without an appropriate consideration could be declared void.

Consequently, neither the commercial company nor the non-profit association form equipped the actors of the social economy sector with the adequate legal structure to smoothly implement such initiatives.[16] However, such structures were needed by many actors of major importance, such as schools and universities, hospitals, charities selling various goods and services, and the like.

The cooperative company offered an interesting but limited alternative. The recognition of this company form in Belgium is linked to the increasing importance devoted to social issues in the second half of the nineteenth century.

The cooperative company was designed to be a collaborative framework between workers and/or customers and itself.[17] It was based on the idea that it operates in the balanced interests of shareholders (who are sometimes also workers or customers) to satisfy their professional or private needs. At the time of their creation, the (public) limited liability company (*société anonyme – naamloze vennootschap*) was designed for capitalists engaging in substantial business activities, while the cooperative company served as its counterpart for the poor who pooled their efforts to survive. The modest investments supposedly involved justified a much lighter regulatory framework.

The cooperative company evolved over time and became a useful instrument for some social economy initiatives, but it did not encompass all its possible forms. It was designed to satisfy its shareholders'needs; it did not necessarily extend to the pursuit of a social mission and, above all, it remained a company with the mandatory goal of making profits for the benefit of the shareholders. In practice, the cooperative company form was often diverted from its original ideal because of the high degree of flexibility offered by its regime.[18] The cooperative company will be further discussed in Sect. 6.

2.3 The Introduction of the Social Purpose Company in 1995

To provide a legal status to entities wishing to engage in commercial transactions without making profits (or limited profits only), the Law of 13 April 1995 'modifiant les lois sur les sociétés commerciales, coordonnées le 30 novembre 1935' [amending the laws on commercial companies, coordinated on 30 November 1935] (MB 17 June

[15] Cass. (2005); Cf. François and Verheyden (2021).

[16] Demonty (1998).

[17] Culot and Tissot (2018).

[18] Corbisier (2021).

1995) introduced a new instrument to the Belgian legal landscape: the social purpose company (*société à finalité sociale – vennootschap met een sociaal oogmerk*).

The social purpose company was a legal status that could be adopted by any of the regular company forms governed by Belgian law. In other words, it was a social variant to the existing company forms.[19] It was also thought of as a label signalling the particular purpose of the company.

Like any commercial company, a social purpose company could engage in commercial transactions. However, contrary to an ordinary company, the social purpose company did not intend to (significantly) enrich its shareholders: they could seek limited profits or no profit at all.[20] Its articles of incorporation had to specify the following (article 164*bis* CLCC which became article 661 of the Companies'Code):

– The social purpose of the company must be precisely described in the articles of incorporation. They must explain how the activities of the company will realize this social purpose. The main goal of the company cannot be the enrichment of its shareholders.
– The shareholders seek no financial advantage or a limited financial advantage only.
– In case of a limited financial advantage, the maximum rate of distribution of the profits cannot exceed the interest rate established by a Royal Decree in execution of the Law of 20 July 1955. Since 1996, this interest rate has been fixed at 6%, meaning that a maximum of 6% of paid-up capital could be distributed as dividends every year (article 1, § 2, 5° of the Royal Decree of 8 January 1962 'fixant les conditions d'agrément des groupements nationaux de sociétés coopératives et des sociétés coopératives' [laying down the conditions for the accreditation of national groupings of cooperative companies and of cooperative companies], MB 19 January 1962). This was coupled with a special tax regime whereby, up to a limited nominal amount, the dividend paid by a social purpose company was not subject to withholding tax.
– The social purpose pursued by the social purpose company can be social, cultural, humanitarian, religious, educational, environmental, and more.[21]

It can be achieved in different ways. Generally, the social purpose is achieved through the activities of the company. For instance, a social purpose company can employ former prisoners to foster their rehabilitation. Others prefer to allocate their profits to the chosen social purpose, in particular by making donations.[22]

– The board of directors must draft a special report annually to describe (i) how the company ensures the achievement of its social purpose and (ii) how expenses are

[19] Mercier (2016).
[20] Tilquin and Fanard (2008).
[21] Lemaitre (1996).
[22] Demonty (1998).

allocated to achieve this purpose.[23] This is conceived as a means to prevent abuses.
– The terms according to which its employees can become shareholders 1 year after being recruited, and according to which they lose this quality 1 year after leaving the company. It is a specificity of the social purpose company to be obliged to allow for its workers to participate in its capital.[24]
– The limitation of the voting power at the general meeting of the shareholders. Democracy being a fundamental feature of the social economy, voting at the general meeting may be implemented either by following the "one person, one vote" principle or by granting one vote per share with a limit of 10% of the voting power.[25]
– An asset-lock clause was mandatory. In the event of liquidation, after all liabilities have been cleared and the shares have been repaid, liquidation proceeds must "be allocated in a way that comes as close as possible to the company's social purpose". This means that they cannot be allocated to the shareholders, which is coherent with the "no or limited profit" condition.

This set of conditions, especially the mandatory workers'participation, was often regarded as too constraining, in view of the meagre (fiscal, reputational, etc.) advantages linked to this special status. The social purpose company therefore proved to be less successful in practice than anticipated.[26] Statistics are not easy to find, but sources refer to approximately 1000 cooperative companies with a social purpose.[27]

The non-profit association form was, in most cases, more appealing because it was mandatory to be eligible for various sorts of public support.[28] Non-profit associations also benefit from a favourable tax regime, in so far as they do not carry out any commercial activity other than an ancillary activity (see Sect. 4.5.1).

Later reforms have somewhat softened the traditional *summa divisio* between companies and associations, but not necessarily entirely in the interests of the actors of the social economy sector. This essentially implied the application of the rules of company law to the non-profit associations, or at least to some of them. For instance, in 2014, rules governing the auditing of accounts were made applicable to the larger non-profit associations. Non-profit associations also became subject to the material jurisdiction of commercial courts (in lieu of the previously competent civil courts).[29]

[23] Demonty (1998).

[24] Coipel (2008).

[25] Coipel (2008).

[26] Aydogdu (2021).

[27] De Gols and Leurquin (2020). Companies that are not cooperatives could also have a social purpose, but cooperatives were by far the most common form of social purpose companies.

[28] Defourny and Nyssens (2008).

[29] Gol (2021).

3 Reforms of 2018–2019

Two new pieces of legislation have turned the existing legislative landscape upside down: the Law of 15 April 2018 'portant réforme du droit des entreprises' [reforming the law of enterprises] (MB 27 April 2018) and the Law of 23 March 2019 'introduisant le Code des sociétés et des associations et portant des dispositions diverses' [law introducing the Code of Companies and Associations and containing various provisions] (MB 4 April 2019).

3.1 Reform of Enterprise Law in 2018

Firstly, the Law of 15 April 2018 replaced the concept of "commerciality", and thus of a commercial company, with the concept of "enterprise" (article 254, al. 1 of the Law of 15 April 2018). As a consequence, the Code of Commerce was replaced by the Code of Economic Law (Code de droit économique – Wetboek van economisch recht).[30]

The definition of the enterprise is a formal rather than a material one. In other words, entities fall under the definition of an enterprise for what they are, rather than for the activities in which they are engaged. Subject to specific exceptions, the enterprise encompasses the following organizations: (i) natural persons with a self-employed activity, (ii) all legal persons and (iii) all other organizations without a legal personality, except if they do not intend to distribute profits to their members or directors (article I.1, al. 1 of the Code of Economic Law).

The concept of enterprise is thus much broader than the concept of commercial actor. All non-profit organisations are enterprises if they have a legal personality.

One of the main objectives behind this paradigm shift was to scrap the distinction between commercial operations and non-commercial operations, which became more and more difficult to maintain, especially when faced with non-profit associations that carried out economic activities as their main activities.[31] It was necessary to reconcile the legal framework with this reality.[32] The distinction between commercial and non-commercial companies therefore disappeared.

A consequence of the adoption of the new concept of enterprise is that the rules that previously applied to commercial actors now apply to all enterprises. This was nonetheless not as ground-breaking as it may seem since, as stated previously, many rules of the commercial economy already applied to non-profit associations. Among the most important changes are:

[30] Garroy (2021).

[31] Culot (2020).

[32] Bogaert (2019).

- The extension to non-profit associations of the freedom to undertake any economic activity,[33] as established by articles II.3 and II.4 of the Code of Economic Law: "Everyone is free to carry out the economic activity of their choice".
- The application of insolvency law to non-profit associations. While previously only commercial actors could be declared bankrupt, now all enterprises can face bankruptcy (articles I.22, 8° and XX.99 of the Code of Economic Law).
- The competence of the commercial courts (renamed enterprise courts) for all matters concerning non-profit associations, which was already partially the case since 2014.

The associative sector was generally not keen on the qualification of non-profit associations as enterprises.[34] Within the ordinary understanding of the concept, an enterprise is characterised by an intention to seek and share profits, thereby enriching its owners. It refers, at least symbolically, to the world of business and capitalism, of which many non-profit associations do not want to be a part.

This conceptual revolution has nonetheless brought new perspectives to the social economy sector. Non-profit associations provided actors of this sector with a more adequate instrument to combine a social mission with an economic activity. An outcome of this first reform was to highlight that, contrary to an ancient belief, not all enterprises seek and share profits.

3.2 Reform of Company and Association Law of 2019

Secondly, the Law of 23 March 2019 introduced the Code of Companies and Associations (Code des sociétés et des associations – Wetboek van vennootschappen en verenigingen) (hereinafter, the "CCA").

The CCA was adopted to replace the former Code of Companies of 1999 (Code des sociétés – Wetboek van vennootschappen), which itself replaced the aforementioned Coordinated Laws on Commercial Companies.

The main objectives of this reform were a "simplification, flexibilization, modernisation and international mobility" of Belgian company law in order to make it competitive and attract more business within the territory.[35]

The new code gathers in one *corpus* the rules applicable to companies and those applicable to non-profit associations (as well as foundations). It therefore also replaces the Law of 27 June 1921 governing non-profit associations.

Albeit not all-encompassing, the convergence between both sets of rules was strengthened, especially in "Book 2" laying down rules applicable to all legal

33 Culot (2020).

34 Culot (2020).

35 Dieux (2019).

persons. Many mechanisms and solutions that were previously specific to companies now apply to non-profit associations as well. Without going into detail at this point, this includes rules concerning day-to-day management, directors'liability, conflicts of interests, liquidation procedure, etc.[36] This assimilation certainly makes the legal form of non-profit association more suitable than before to the pursuit of a socially driven economic activity.

Above all, the new code introduces a new (but only partially different) distinguishing criterion between companies and non-profit associations: the distribution or non-distribution of profits. This means that the prohibition on conducting commercial activities (a concept that had been repealed in 2018 anyway) is no longer a distinguishing feature of the non-profit association. The new definitions of the company and the non-profit association based on this criterion is further discussed in Sects. 4 and 5.

4 The Non-Profit Legal Persons as an Instrument of the Social Economy

4.1 Non-Profit Association

4.1.1 New Definition of the Non-Profit Association

As previously stated, the Law of 27 June 1921 forbade non-profit associations from (i) pursuing any commercial activity other than that considered to be ancillary and necessary to its disinterested goal and from (ii) distributing profits to its members or directors.

Article 1:2 CCA henceforth provides for a new definition of the non-profit association. It states that a non-profit association is driven by a disinterested goal in the pursuit of one or more specific activities.

There is no longer any restriction to the nature of the activities that can be carried out by a non-profit association. Read together with the previously mentioned articles II.3 and II.4 of the Code of Economic Law which proclaim the freedom to undertake any economic activity, this new definition is understood as permitting non-profit associations to carry out socially driven economic activities or any other economic activity. Consequently, non-profit associations are henceforth in principle allowed to seek profits in the pursuit of their economic activity, even if the interplay with other types of rules (subsidies, tax rules) makes this less easy in practice.[37]

However, the same provision states that a non-profit association may not distribute or procure any direct or indirect financial advantage to its founders, members, directors, or any other person, except in pursuit of its disinterested goal. Here lies the

[36] Gol (2021).

[37] Denef and Van Baelen (2020).

new distinguishing feature between companies and non-profit associations: while companies must seek and share profits, non-profit associations can seek profits but are prohibited from distributing them directly or indirectly, under penalty of nullity of the operation.

The preparatory work of the CCA reveals that prohibited distributions encompass any distribution or capital transfer from the non-profit association, which are comparable to a dividend payment in a company.[38]

Disguised distributions, that is, any transfer of assets or value outside of market conditions, are also prohibited. Indirect distributions are defined by article 1:4 CCA as operations of the non-profit association by which its assets decrease or its liabilities increase and for which it receives a compensation that it is patently too low or non-existent.

This prohibition is mitigated by the explicit authorization to provide services for free or at advantageous prices when this falls within the scope of the disinterested goal of the non-profit association. Those advantages must be delivered within the limits of a normal fulfilment of its specified activities (article 1:4, al. 2 CCA).

As was previously the case, Belgian law also recognizes the international non-profit association as an alternative form of association. It is defined as an association within the meaning of article 1:2 CCA which has a purpose of international utility (article 10:1 CCA). Its legal personality is granted by a royal decree.

The international non-profit association is governed according to the same principles as its 'domestic'counterpart, although the CCA grants a higher level of flexibility to the founders and members of an international non-profit association in modelling its articles of incorporation and its operating rules. An international non-profit association is recognised as an enterprise which can undertake the economic activity of its choice, provided that is does not distribute its profit to its members or directors, even indirectly.[39]

4.1.2 Convergence of the Rules Governing Non-Profit Associations with those Applicable to Companies

When referring to non-profit associations, the term "non-profit" is increasingly replaced by "social profit", in an effort to express their "economic weight and their legitimacy as 'enterprises'".[40]

The CCA has introduced rules—drawn from company law—which make non-profit associations better equipped to participate in the economy. The main objectives are to make them technically efficient and to provide third parties such as creditors with an adequate protection.[41]

[38] Projet de loi portant réforme du droit des entreprises, exposé des motifs, *Doc. parl.*, Ch. repr., sess. ord. 2017–2018, n° 54 2828/001, pp. 13–14.

[39] Navez and Deckers (2020)

[40] Nyssens and Huybrechts (2020).

[41] Garroy (2021).

The following evolutions are significant:

– Harmonisation of the rules governing the liability of directors in companies and non-profit associations. Under the former regime, directors of non-profit associations were liable for any error or negligence (even the slightest) committed in the performance of their duties, regardless of whether this affected the non-profit association itself or third parties.[42]

They are now subject to the same provision applicable to directors of companies, which clarifies that directors are only liable to the company or association for decisions, acts or conducts that patently exceed the margin within which prudent and diligent directors in the same circumstances can reasonably have a diverging opinion (article 2:56, al. 1 CCA). *Vis-à-vis* third parties and the non-profit association itself, directors are liable for any damage resulting from a violation of the CCA or of the articles of incorporation of the entity (article 2:56, al. 3 CCA).

The amount of damages to be paid by the directors is capped to an amount fixed between 125,000 EUR and 12 million EUR, depending on the legal person's annual turnover and the total of its balance sheet. The directors do not benefit from the cap in case of gross negligence or wilful misconduct, among other exceptions. This provides a more comfortable framework for directors of a non-profit association to carry out an economic activity, considering the inevitable risks of business.

– Adoption of conflict of interest rules for non-profit associations. The avoidance of conflicts of interest was previously solely guided by good governance principles and potentially by the articles of incorporation of the entity. No hard law rules provided for a mandatory procedure to be observed in such situations.[43]

The CCA now defines a conflict of interest in a non-profit association as a situation in which the board of directors is called upon to make a decision in relation to which a director, either directly or indirectly, has a conflicting interest of a patrimonial nature. The CCA provides for a thorough *modus operandi* modelled on the one applicable to companies. It ensures that the best interests of the non-profit association and its members are protected, notably by excluding the conflicted director from the decision-making process and by imposing publicity measures that prevent the operation from being carried out in secret (article 9:8 CCA).

– Creation of an "alarm bell" procedure for non-profit associations. Under article 2:52 CCA (which applies to all legal persons), if serious and consistent matters are likely to jeopardise the continuity of the legal person, the board of directors shall deliberate on the measures that should be taken to ensure the continuity of the economic activity for a minimum of 12 months.

The rationale of this rule is to protect economic exchanges and relationships (especially creditors) by ensuring that financial difficulties are not left without an

[42] Simonart (2020).

[43] Coipel and Davagle (2017); Simonart (2020).

appropriate response. This also applies to non-profit associations which are now enterprises like any other and will presumably gain greater economic weight.

- Creation of an elaborate liquidation procedure applicable to non-profit associations. The Law of 27 June 1921 only provided for rather sketchy liquidation rules. This new procedure resembles that applicable to companies to ensure that non-profit associations do not opt for liquidation to avoid bankruptcy and paying back their creditors.[44]
- Extension of the definition of day-to-day management. Since the Law of 27 June 1921 did not provide for a definition of this concept, associations had to settle for the narrow definition established by the Court of Cassation according to which day-to-day management was limited to the daily needs of the association and the accomplishment of acts that are both urgent and of minor importance.[45]

The CCA now defines day-to-day management as acts and decisions which do not exceed the daily needs of the associations, or which do not justify the intervention of the board of directors because of their minor importance or urgent nature (article 9: 10, al. 2 CCA). Therefore, it is no longer a requirement that the acts to be accomplished be both urgent and of minor importance: they can be urgent, of minor importance or both.

This broader definition, which also applies to companies, provides managers with a higher degree of flexibility and freedom to efficiently pursue the non-profit association's economy activity.

Possibility to appoint a legal person as a director of a non-profit association. The legal person is represented by a permanent representative (articles 9:5, al. 1 et 2: 55 CCA).

Some elements of company law have nonetheless not been made applicable to non-profit associations:

- Companies and non-profit associations are still governed by two different paradigms. A company is characterised by an association of shareholders who make a contribution. In exchange for their investment, they receive shares in the company. By contrast, membership in a non-profit association is not conditional upon an investment and does not entail the right to hold shares in return.
- Founders of a company must prepare a financial plan in which they justify the amount of the initial contributions considering the planned activities for a minimum period of 2 years (articles 5:4, 6:5 and 7:3 CCA). The financial plan must notably include a description of the activities, a description of the sources of funding and a revenue and expense budget. In the event of bankruptcy within 3 years after the incorporation of the company, if the contributions were patently too low to sustain the planned activities for a period of at least 2 years, the

[44] Simonart (2020).

[45] Cass. (2009).

founders may be held liable for the company's commitments (articles 5:16, 6:17 and 7:18 CCA).

The obligation to prepare a financial plan and the liability of the founders do not exist in non-profit associations since founders do not make contributions.

- As the non-profit association does not issue shares in consideration for contributions, rules governing transfers of shares do not apply to them.
- Likewise, rules governing capital increases do not apply to non-profit associations since they do not have a capital.
- As previously stated, an "alarm bell" procedure is now provided for in cases where the continuity of the non-profit association is jeopardised. However, unlike companies, the board of director does not have to call a general meeting to discuss the measures to be adopted and therefore the board will not be held liable for damage suffered by a third party for not convening such a meeting (articles 5:153, 6:119 and 7:228 CCA).
- Rules regarding control, parent companies and subsidiaries that apply to companies do not apply to non-profit associations (articles 1:14 sq. CCA). This also results from the absence of shares in non-profit associations. The concept of ownership remains inexistent in the associative form and, consequently, the logic of corporate groups has not been transposed to non-profit associations, notwithstanding the acknowledged fact that some associations are controlled by others and that, therefore, groups of associations exist in much the same way as groups of companies.

Overall, recent legislative evolutions have tended to move towards a convergence of the rules applicable to companies and to non-profit associations. This should make them more suitable to pursue an economic activity and certainly constitutes a more favourable framework for the implementation of social economy initiatives.

4.1.3 The Concern to Preserve the Core Specificities and Values of the Associative Form

One could, however, question whether this assimilation goes too far. Aiming to preserve the core specificities and values of the associative sector, some authors place a value on fighting against fake non-profit associations, much the same way as they do against fake cooperative companies (see Sect. 6.2). Fake non-profit associations are those which use the legal form of a non-profit association with the intention to enrich their members.[46]

In this regard, the CCA provides for specific sanctions to ensure that non-profit associations remain faithful to their intrinsic characteristics[47]:

[46] Culot (2020).

[47] Coipel (2020).

- Nullity of a non-profit association if it is not incorporated to pursue a disinterested goal but is rather established for profit purposes (article 9:4, 4° and 5° CCA).
- Nullity of operations in breach of the disinterested goal pursued by the non-profit association (article 1:2 CCA).
- Judicial dissolution of the non-profit association may be requested if it does not allocate its profits to its disinterested goal or if it distributes or procures a direct or indirect financial advantage to its members or directors (article 2:113, 2° and 3° CCA).
- An asset-lock applies to non-profit associations. If they are liquidated, the proceeds may not be allocated directly or indirectly to the members or to the directors. The general meeting will decide on the allocation of the remaining assets, failing which the liquidator will have to transfer the assets to "an allocation that comes as close as possible to the purpose for which the association was established" (article 2:132 CCA).

Some authors contend that the aforementioned sanctions might not suffice to safeguard the ethics of the associative form and that specificities other than the pursuit of a disinterested goal and the prohibition of distributions should have been considered by the CCA.

According to Michel Coipel, the functioning of the non-profit association must reflect the primacy of its social mission. Abstaining from distributions and procuring financial advantages is not sufficient, the "lifestyle" of the non-profit association must also remain sober and conservative. Coipel specifically refers to "unnecessary and lavish expenditures" such as excessive remunerations, visits to restaurants, luxury cars or international travel, which are incompatible with the values of the associative sector.[48]

In this regard, he argues that the annual management reporting obligations for larger non-profit associations should have been tailored to the specificities of the associative form, rather than being identical to the obligations applicable to non-listed companies. The annual management report should demonstrate how expenditures (including remunerations) contribute to the realisation of the social mission pursued by the non-profit association.[49]

Similarly, as previously stated, conflict of interest rules applicable to companies have been entirely transposed to non-profit associations, without considering that patrimonial conflicts of interest are less likely to occur than in a company, while moral conflicts are more likely to emerge and should have been envisaged by the CCA.[50]

To sum up, while a convergence of the rules governing companies and non-profit associations is welcome to enable the latter to actively participate in the economy,

[48] Coipel (2020).

[49] Coipel (2020).

[50] Coipel and Davagle (2019).

this should not go so far as a complete assimilation disregarding the specificities of the associative form.

4.2 Foundation

A foundation displays the following features (article 1:3 CCA):

- It is a legal person without members;
- It is established by a legal act by one or more persons;
- Its assets are allocated to the pursuit of a disinterested purpose in the context of the exercise of one or more specific activities which constitute its object;
- Like an association, it may not distribute or procure, directly or indirectly, any financial advantage to its founders, directors or any other person, except for the disinterested purpose determined by its articles of incorporation.

A foundation can be recognised to be of "public utility" if "it seeks to carry out a mission of a philanthropic, philosophical, religious, scientific, artistic, educational or cultural nature" (article 11:1 CCA). Other foundations are called "private foundations".

The main difference between foundations and non-profit associations is that the foundation has no members and thus no general meeting. It is a pool of assets managed by a board of directors. A non-profit association must have at least two members, but they are not under the obligation to make a financial contribution.[51]

4.3 Mutuals

Mutuals (*mutualités – ziekenfondsen*) are regulated by the Law of 6 August 1990 'relative aux mutualités et aux unions nationales de mutualités' [on mutuals and national unions of mutuals] (MB 28 September 1990).

They are defined as associations of natural persons which, in a spirit of foresight, mutual assistance and solidarity, aim to promote physical, mental, and social well-being.[52]

In concrete terms, their missions are provided for by law and consist of, at least[53]:

- Participating in the execution of the compulsory health insurance. For instance, mutuals process refunds of their members' healthcare provider consultation

[51] Coipel and Davagle (2017).

[52] Article 2, §1 of the Law of 6 August 1990.

[53] Article 3, al. 1 of the Law of 6 August 1990.

certificates. As refunds are provided for by the public social security system, they are identical for all mutuals.
– Providing refunds for the prevention and treatment of illness and disability, as well as allowances for work incapacity and the promotion of physical, mental and social well-being (i.e. supplementary health insurance). For instance, mutuals can provide their members with allowances to (partially) compensate for their psychotherapy sessions or their membership in a sports club.
– In a general perspective, providing help, information, guidance, and assistance to promote physical, mental, and social well-being.

All natural persons must be affiliated to the mutual of their choice in order to benefit from refunds and allowances. To remain affiliated, it is compulsory to pay a subscription fee.

Similarly to a non-profit association, a mutual is composed of two organs: a board of directors and a general meeting.

The board of directors is elected by the assembly which is composed of all the natural persons who are members of the mutual. Among other things, the general meeting defines the content of the supplementary health insurance that the mutual offers to its members.[54]

All mutuals must be affiliated to a national union of mutuals (*unions nationales de mutualités – landsbonden van ziekenfondsen*) which is an association of at least two mutuals. There are five national unions of mutuals in Belgium, some of which are historically linked to a political or philosophical movement: Christian, neutral, socialist, liberal, and free.

One of the main missions of national unions of mutuals is to supervise the proper functioning of its affiliated mutuals.[55]

4.4 Accounting Rules Applicable to Non-Profit Legal Persons

Non-profit associations were formerly exempt from any accountancy obligation, and thus from the obligation to publish their annual accounts (contrarily to companies). This leniency was explained by the purely "disinterested" conception of their purpose and the prohibition to engage in commercial and industrial activities, that applied at the time. In addition, accounting obligations were thought to limit the freedom of association.[56]

However, non-profit associations did engage in commercial activities and some of them carried a large economic weight (see Sect. 2.1). Moreover, a few scandals

[54] Article 9, §1, 4° of the Law of 6 August 1990.
[55] Office de Contrôle des Mutualités (2022).
[56] Kilesse (2004).

erupted involving unscrupulous uses of non-profit associations'resources.[57] It was thus necessary to foster transparency and accountability in the sector of non-profit associations.

With this aim in mind, the Law of 2 May 2002 'sur les associations sans but lucratif, les associations internationales sans but lucratif et les foundations' [on non-profit associations, international non-profit associations and foundations] (MB 11 December 2002) introduced a new accounting framework for non-profit associations.

This framework subjected non-profit associations to different sets of rules depending on their size. In that respect, stricter and more constraining rules applied to larger non-profit associations whereas smaller non-profit associations were imposed less and more flexible rules. The objective was to establish accounting obligations that are proportionate to the economic weight of the non-profit association, as is also the case for companies.

The CCA has maintained this distinguishing criterion, which applies according to different categories:

1. "micro" non-profit associations or foundations are those that do not exceed more than one of the following criteria (articles 1:29 and 1:31 CCA):

   a. annual average of the number of employees: 10;
   b. annual turnover of € 700.000;
   c. total of the balance sheet of € 350.000.

Micro associations or foundations must keep accounts according to a micro-scheme, which is a simplified version of the classic accounting scheme for large associations and foundations (articles 3:47, §4 and 3:51, §4 CCA).

2. "small" non-profit associations or foundations are those that do not exceed more than one of the following criteria (articles 1:28 and 1:30 CCA):

   a. annual average of the number of employees: 50;
   b. annual turnover of € 9 million;
   c. total of the balance sheet of € 4.5 million.

Small associations or foundations must keep accounts according to a shortened scheme, which is a shortened version of the classic accounting scheme for large associations and foundations, however more elaborate than the micro-scheme applicable to micro associations and foundations (articles 3:47, §3 and 3:51, §3 CCA).

[57] Kilesse (2004).

3. A subcategory of small associations and foundations are eligible for an even simpler accounting method, essentially in the form of a cash accounting (articles 3:47, §2 and 3:51, §2 CCA and art. III.82, §2 of the Code of Economic Law). This subcategory includes the associations or foundations that do not exceed more than one of the following criteria:

   a. annual average of the number of employees: 5;
   b. annual income, excluding non-recurring revenue: € 334.500;
   c. total of assets: € 1.337.000;
   d. total of debts: € 1.337.000.

4. Non-profit associations that do not meet the criteria to be defined as "small" or "micro" are commonly referred to as "large" non-profit associations. They must comply with the full set of accounting obligations.

In sum, the accounting treatment of non-profit associations illustrates the recognition of their economic significance and thus, the necessity to monitor their accounts in the same way as any other economic actor. It also acknowledges their specificities and is designed to avoid overburdening the smaller actors, which would negatively impact on the vitality of associative life.

4.5 Tax Considerations Linked to Non-Profit Legal Persons

4.5.1 The Tax Regime Applicable to Non-Profit Legal Persons

The Belgian Income Tax Code of 1992 (Code des impôts sur les revenus – Wetboek van de inkomstenbelastingen) (hereinafter, the "ITC/92") distinguishes between tax on legal persons and corporate tax.[58]

Under the ITC/92, non-profit legal persons (which are tax residents of Belgium) are subject either to the tax on legal persons or to corporate tax, depending on whether they "are engaged in profit-making exploitation or operations" (article 220, 3° ITC/92). This has to be established *in concreto*, considering "the concrete factual and operational situation" of the non-profit legal person.[59]

If "profit-making exploitation or operations" can be identified, the non-profit legal person will be subject to corporate tax on all of its profits. Conversely, if it is established that its economic activities are not carried out with an intention of making profits, the non-profit legal person will be subject to tax on legal persons.

There are, however, some exceptions to this rule, where non-profit legal persons will not be subject to corporate tax but rather to the tax on legal persons even though they make profits:

[58] For a general presentation of the income tax regime of the social economy, see Garroy (2020).
[59] Ceci (2020).

– Non-profit associations and other legal persons which are exclusively or mainly active in “privileged fields”. Each field is subject to its own admission method which can notably consist of an accreditation of the non-profit legal person.[60] A limitative list is provided by article 181 ITC/92. It includes, for example, the following areas: (i) the protection and development of the professional or interprofessional interests of their members, (ii) education, (iii) the organisation of fairs or exhibitions, (iv) assistance to families or the elderly and (v) the certification of financial securities.
– With regard to isolated operations or exceptional operations (article 182, 1° ITC/92).
– With regard to operations that consist in the investment of funds collected by the non-profit legal person in the course of its statutory mission (article 182, 2° ITC/92).
– Non-profit legal persons that carry out an ancillary economic activity with an intention of making profits and non-profit legal persons that seek profits but do not implement commercial or industrial methods[61] in their activities (article 182, 3° ITC/92).

The purpose of this rule, which existed prior to the reforms of 2018–2019, is to avoid unfair competition between economic actors: all those seeking to make profits using commercial or industrial methods should be taxed similarly.[62] The application of these rules does not strictly depend on the legal form, as they apply to associations and to other legal persons.

Nonetheless, this analysis clearly depends on subjective judgements, which can lead to legal uncertainty and, potentially, to a difference of treatment between non-profit legal persons.[63] Indeed, without delving into detail, the tax base, tax rates and collecting methods vary between the two, with tax on legal persons being generally more favourable than corporate tax. In a nutshell, those subject to the former usually benefit in practice from a tax-free regime.

4.5.2 Tax Reductions on Donations to Some Non-Profit Legal Persons

In order to incentivise donations to non-profit legal persons which pursue a social mission, a system of tax reductions is implemented by article 145/33 ITC/92.

This provision contains a list of non-profit legal persons that can receive donations admitted for tax reductions and it includes, among others, universities, social services centres, museums, cultural institutions and institutions which assist people or countries in need (e.g., war victims, protected children, individuals with

[60] Garroy and Gérard (2019).

[61] The analysis must consider the commercial or industrial methods implemented by similar enterprises in the same sector.

[62] Ceci (2020).

[63] Ceci (2020).

disabilities or illnesses, development cooperation). Some organisations are directly covered by the law, others require prior accreditation by the Minister of Finance. Interestingly, this advantageous tax regime benefits institutions which are either public or private, and which may take the form of non-profit associations without this status being systematically required.

Under this tax system, a tax reduction is granted annually to each taxpayer that has made admitted donations. The tax reduction is equal to 45% of the total amount of admitted donations. To be eligible for the tax reduction, the taxpayer should make one or more donations for an amount of at least € 40 per non-profit legal person and per year. The amount of the tax reduction cannot exceed 10% of the taxpayer's net income or 392.200 EUR.

5 The Company as an Instrument of the Social Economy

5.1 A New Approach to the Purposes of a Company

As previously stated, a company is traditionally profit oriented. The shareholders first and foremost seek to make and then share the profits generated by its economic activities. Former pieces of legislation governing company law limited the purposes of a company to the procurement of a financial advantage for its shareholders.

A decision of the Court of Cassation of 28 November 2013 states that the interest of the company is determined by the profit-making goal of its present and future shareholders.[64] This decision was received with mixed feelings. Some rejoiced at the idea that the goals of the company were to be envisaged in the long-term, as indicated by the reference to future shareholders. Others regretted that the interests of other stakeholders and non-financial interests were not even mentioned.

Companies could, of course, acquire the social purpose status. However, this came with plenty of strict conditions to be fulfilled (see Sect. 2.3 above). Consequently, very few companies opted for the social purpose legal form.

The reform of 2019 repealed the social purpose company in favour of a more flexible approach to the purposes a company can pursue.

Article 1:1 CCA now provides that *one of* the purposes of a company is to procure a direct or indirect financial advantage to its partners [shareholders]. Two conclusions can be drawn from this provision: (i) any company can henceforth set other purposes for itself, including social purposes, provided that distribution to the shareholders remains one the purposes, and (ii) the profit purpose of a company does not have to be its main purpose; any company can limit the financial advantages that it procures to its shareholders.

This text differs from the original text of the bill which did not include the possibility for companies to pursue purposes other than profit-making and

[64] Cass. (2013).

distribution. The rationale of the member of Parliament who submitted the amendment was to advocate for a "true liberalism".[65] He argued that the shareholders should be free to set other purposes that would condition the realisation of the profit purpose.[66]

His amendment was also motivated by political considerations. He trusted that it would encourage the founders to consider assigning purposes other than profit – especially social purposes – to their company.[67]

A second amendment submitted by the same member of Parliament, which was also adopted in the final text, consists in the obligation to specify those other purposes (if any) in the articles of incorporation of the company (articles 2:8, § 2, 11° and 2:5, § 1, al. 3 CCA).[68] The objective is to provide directors with legal protection when they make decisions that take non-profit interests into account. Conversely, directors may be liable if they neglect to pursue those other purposes.[69] The other purposes indicated in the articles of incorporation may be modified subject to a strict procedure and a special majority of 80% of the votes at the general meeting (articles 5:101, 6:86 and 7:154 CCA).

Notwithstanding the foregoing, the profit purpose remains the so-called "legal specificity" of a company: it was officially reaffirmed that the purpose of a company is to distribute at least some of the generated profits to its shareholders.[70] In this respect, leonine clauses (i.e. provisions which exclude one or more shareholders from participating in the profits) amount to a breach of the profit purpose of a company and are forbidden by company law (articles 4:2, 5:14, 6:15 and 7:16 CCA).

To a large extent, the CCA has introduced a greater flexibility to the purposes a company can pursue, while remaining a company. Subject to the conditions above, the purposes of a company are now highly customisable.

This is certainly more practical than the previous social purpose company which was subject to overly constraining rules.

[65] Projet de loi introduisant le Code des sociétés et des associations et portant des dispositions diverses, amendement n° 331 de M. de Lamotte, *Doc. parl.*, Ch. repr., sess. ord. 2017–2018, n° 54-3119/008, p. 190.

[66] Amendement n° 331 de M. de Lamotte, p. 190.

[67] François and Verheyden (2021).

[68] Projet de loi introduisant le Code des sociétés et des associations et portant des dispositions diverses, amendement n° 332 de M. de Lamotte, *Doc. parl.*, Ch. repr., sess. ord. 2017–2018, n° 54-3119/008, p. 192.

[69] François and Verheyden (2021).

[70] Amendement n° 331 de M. de Lamotte, p. 190.

5.2 Should Companies and Non-Profit Associations Be Kept as Separate Legal Forms?

Considering that companies may now pursue purposes other than profit, including social purposes, and associations are allowed to engage in any economic activity, one may wonder if it is relevant to maintain two distinct legal forms.

Dirk Van Gerven pleads in favour of a single legal form which could either seek profits or not seek profits at all and would generally pursue a mixed purpose.[71] He believes that it is unreasonable nowadays for companies to limit themselves to a profit purpose. According to him, all companies should reconcile their profit purpose with social purposes.

While social entrepreneurship must certainly be encouraged, completely discarding the associative form for a fully customisable company form would, however, assuredly fail to win over the associative sector. It is very much attached to the legal specificities of the non-profit association which serve as safeguards of its values and as a label clearly signalling to the general public the goal of the legal person. In this respect, the prohibition of distributions and asset-lock are considered as essential: the associative sector values holding on to a legal form which can never be used as a means to enrich its shareholders or members.

6 The Cooperative Company and Its Accreditation

6.1 The Cooperative Ideal

While the traditional company primarily serves the interests of its shareholders, the cooperative company is ideally designed as a grouping of people with a "double quality": besides being shareholders, they are also employees or customers, and the company serves to satisfy their professional or private needs.[72] The cooperative company aspires to be a collaborative framework between its workers and/or customers and itself.[73]

This collaborative framework can take different forms. For instance, the shareholders can, at the same time, also be workers of the cooperative.[74] The profits are then allocated to those shareholders-workers as a form of additional remuneration. The shareholders of the cooperative can also be its customers or clients. In this case, they have a privileged access to the goods or services supplied by the cooperative.

[71] Van Gerven (2020).

[72] Gollier et al. (2020).

[73] Culot and Tissot (2018).

[74] Delcorde and Bernaerts (2021).

Alternatively, the shareholders can be suppliers of the cooperative who join forces to market their products.[75]

This cooperative ideal also entails a democratic functioning, sometimes translated into a "one person, one vote" principle to mark the difference from other companies where power is proportional to the shareholders' (economic) contributions.

6.2 *The Issue of "Fake Cooperatives" and Their Accreditation as a Solution*

As previously stated, the inception of the cooperative form is linked to the increasing importance of social issues in the second half of the nineteenth century.

Surprisingly, the principles and values of the cooperative ideal were not embedded in the first pieces of legislation governing the cooperative company. It was conceived as a flexible company form, which was loosely regulated and hence provided its founders with broad organisational latitude.

Moreover, no precise definition of this company form was provided for by law.[76] It was simply stated that the cooperative company is composed of a variable number of shareholders and variable contributions.[77]

The perks of the cooperative form included: low minimum capital requirements (compared to the public limited liability company), the possibility of appointing a sole director, the possibility of issuing shares with multiple voting rights, the possibility to issue new shares or to cancel shares without amending the articles of incorporation thereby making it possible to increase the capital without resorting to a notary, etc..[78]

For the abovementioned reasons, the cooperative company was soon diverted from the original cooperative ideal.[79] It was used by entrepreneurs who were solely interested in the degree of latitude granted, rather than in the cooperative ideal. They were referred to as "fake cooperatives" because their founders adopted this company form for practical reasons, without aspiring to the cooperative values.[80] This was not illegal, however, as the cooperative ideal was not translated into mandatory rules of company law.

By contrast, "real cooperatives" pursued the cooperative ideal, at least in the mind and the public discourse of their shareholders. They wanted their "specialness" to be recognized and protected and found it difficult to accept the existence of fake cooperatives with which they shared the same company form but not the same

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[75] Culot and Tissot (2018); Gollier et al. (2020).

[76] Culot and Tissot (2018).

[77] Delcorde and Bernaerts (2021).

[78] Culot and Tissot (2018).

[79] Corbisier (2021).

[80] Delcorde and Bernaerts (2021).

values. They highlighted the importance for third parties to be able to distinguish between real and fake cooperatives.

The accreditation was presented as a solution to this problem.[81] The Law of 20 July 1955 'portant institution d'un Conseil national de la Coopération' [establishing a National Cooperation Council] (MB 10 August 1955) provides for the accreditation of cooperative companies and lays down five cooperative principles which are further specified by a Royal Decree of 8 January 1962 'fixant les conditions d'agrément des groupements de sociétés coopératives et des sociétés coopératives' [laying down the conditions for the accreditation of groups of cooperative companies and cooperative companies] (MB 19 January 1962):

- Voluntary adhesion, meaning everyone must be allowed to take part in the company if fulfilling the (general) conditions laid down in the articles of association;
- Equality of voting power at the general meetings, or at least limitation of any shareholder's voting power, to prevent any particular shareholder from controlling the company;
- Appointment of directors and auditors by the general meeting;
- Moderate dividends, called "interest rate" and only granted to the owners of shares;
- A discount granted to the shareholders (article 5 of the Law of 20 July 1955) (see more on this below).

The administration of the Ministry of Economic Affairs verifies that these conditions are met by the cooperative company before the Minister grants the accreditation.

In practice, a few cooperative companies were granted the accreditation, but the system did not encounter great success. It is more or less unknown by the general public and did not solve the problem of fake cooperatives for many cooperatives who considered themselves to be "real" but still refused to abide by (at least one of) the conditions of the accreditation.

6.3 The Cooperative Company Under the CCA

6.3.1 Characteristics of the Cooperative Form

In a renewed effort to tackle fake cooperatives, the CCA henceforward specifies the "characteristic values" of the cooperative form in its definition, in order to make sure that such companies are driven by the cooperative ideal.[82]

At the same time, the rules applicable to the (private) limited liability company (*société à reponsabilité limitée/besloten vennootschap*) were significantly lightened.

[81] Bogaert (2021).

[82] Delcorde and Bernaerts (2021).

This company is now characterised by a high degree of flexibility, greater than the one enjoyed by the cooperative company in its previous or current format. Therefore, fake cooperatives are both forbidden to remain cooperatives (due to the new definition) and—given their reasons for choosing the cooperative form in the first place—strongly encouraged to become a limited liability company.

The main purpose of a cooperative company embodied in its definition is inspired by the European cooperative company (article 1, §3 of Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L 207 of 18 August 2003). The CCA defines this main purpose as "the satisfaction of the needs and/or the development of economic and/or social activities of the cooperative's shareholders or of interested third parties, notably by concluding agreements with them concerning the provision of goods or services or performance of work, as part of the activities carried out by the company". It adds that "the cooperative company may also have as its goal the intention to meet the needs of its shareholders or of its parent companies and their shareholders or of interested third parties whether or not through the intervention of subsidiaries. It may also have the aim of promoting their economic and/or social activities through participation in one or more other companies" (article 6:1, §1, CCA).

Pressured by the (very diverse) members of the cooperative world, the legislator opted for an overly broad definition so as not to affect the development of the cooperative sector (i.e. to accommodate the effective situation and circumstances of any vociferous cooperative considering itself as "real") (Malherbe et al. 2020). It thereby implicitly renounced affirming a strong specificity of the cooperative company. In particular, it is important to state that the main purpose of the company is to satisfy its shareholders'economic needs, but this specificity gets completely lost when one adds the needs of "third parties", because obviously the very nature of *any* economic activity is to satisfy *someone's* needs.

Furthermore, the CCA provides for a series of mandatory rules as a means to safeguard the cooperative ideal. The existence of these rules explains why the cooperative company is now less flexible than the limited liability company.

– The articles of incorporation must specify the cooperative purpose of the company and the values that it stands for (article 6:1, §4, CCA).[83]
– Considering the cooperative company is based on an idea of cooperation, it must be incorporated by at least three founders and it must have at least three shareholders at all times (article 6:3 and 6:126 CCA).
– Equality between the shareholders being one of the fundamental principles of the cooperative form, all shares issued by the company must grant the right to vote at the general meeting (articles 6:19 and 6:39 CCA). It makes sense to prohibit non-voting shares considering that cooperative companies aspire to bring individuals together for a common project. Every shareholder must therefore be able to contribute to its accomplishment. Shares granting multiple voting rights remain

[83] Gollier et al. (2020).

nonetheless allowed (article 6:41 CCA), meaning that some shareholders can be granted so many voting rights that the unitary voting right of others becomes meaningless.
- To accomplish their common project, shareholders should be able to know one another. Accordingly, only registered shares can be issued by a cooperative company (and not dematerialised shares) (article 6:19 CCA). Similarly, its shares cannot be admitted for trading on a regulated or unregulated market (article 6:1, §2 CCA).
- Notwithstanding any contrary provision in the articles of incorporation, the general meeting can exclude a shareholder for justified reasons (article 6:123, §1 CCA). The objective is to protect the cooperative company from shareholders who do not share its values, although exclusion can sometimes be used for less noble reasons.
- The cooperative ideal entails that shareholders must be able to join and leave the company easily and smoothly. The procedure for issuing new shares is therefore simplified compared to that applicable to other company forms insofar as it does not require an amendment of the cooperative company's articles of incorporation before a notary. Regarding the exit of a shareholder, the CCA provides for a mandatory right to leave the company (article 6:120 CCA). The company must then, in principle, reimburse the shareholder's contribution.

The CCA also provides for non-mandatory rules which aim to facilitate the implementation of the cooperative ideal in the functioning of the company. In this regard, to ensure that its shareholders share the same values, the articles of incorporation of the cooperative company can provide for specific admission criteria. The articles may also provide that any shareholder that ceases to meet these criteria will have to leave the company and will thus lose his shareholder status (article 6:54, 6:105 and 6:122 CCA).

6.3.2 Accreditation of the Cooperative Company

The possibility for a cooperative company to be accredited pursuant to the Law of 20 July 1955 (see Sect. 6.2) as a guarantee that it is driven by the cooperative ideal has been maintained notwithstanding the new safeguards introduced by the CCA. Indeed, this law provides for criteria that are stricter than the conditions laid down in the CCA.

The CCA provides that a cooperative may be accredited if its main purpose is to provide its shareholders with a social or financial advantage in order to satisfy their professional or private needs (article 8:4 CCA).

Moreover, its functioning and its articles of incorporation must comply with the cooperative principles enshrined in the Law of 20 July 1955. Those principles are specified by article 1 of the Royal Decree of 8 January 1962.

- Voluntary adhesion. The Royal Decree states that the adhesion of the shareholders must be voluntary. The cooperative must be open to all and can refuse the admission of shareholders or exclude shareholders solely if they do not comply or cease to comply with the criteria contained in its articles of incorporation, or in case they commit acts in breach of the interests of the company. In that case, the company must explain the reasons for its decision.

– Equality or limitation of voting power at the general meetings. The principle "one person, one vote", regardless of the number of shares held by each shareholder, must be applied when voting at the general meeting of shareholders. Nevertheless, the articles of incorporation may depart from this rule provided that one shareholder does not benefit from more than 10% of the voting power. In addition, shares of the same value categories must grant the same rights and obligations.
– Appointment of directors and auditors by the general meeting. They may also be appointed in the articles of incorporation, but in that case, the possibility and the terms for revoking them must be specified.

The Royal Decree states that directors are in principle not remunerated for their duties. However, if they are, their remuneration must be determined by the general meeting, and it cannot consist of a share of the profits of the company.

– Moderate "interest rate", limited to shares. A dividend can only be awarded to the owners of shares, and it may not exceed 6% of the nominal values of the shares.
– Discounts for shareholders. If the financial advantage granted by the cooperative company to its shareholders is a discount, it must be allocated in proportion to the number or value of operations between the company and the shareholder.

The Royal Decree provides that part of the annual resources of the cooperative company must be allocated to the information and training of its existing or potential shareholders, or of the general public.

As a means to prevent abuses, the board of directors must annually prepare a special report to describe how the cooperative company has fulfilled the conditions for accreditation.

Besides the recognition that they are 'real'cooperatives, accreditation is favourable for cooperative companies in terms of taxation (SPF/FOD Economie 2022).

6.3.3 Accreditation as a Social Enterprise

A cooperative company may receive an accreditation as a social enterprise, if its main purpose is to generate, in the general interest, a positive societal impact for human beings, the environment or society (article 8:5 CCA).

The accreditation of a cooperative company as a social enterprise replaces the previous status of social purpose company (see Sect. 2.3). There are less conditions to be fulfilled, but while previously the social purpose company status could be adopted by a company of any form, only a cooperative company may henceforth be accredited as a social enterprise.

To be accredited as a social enterprise, a cooperative company must fulfil the following conditions (article 8:5 CCA and article 6 of the Royal Decree of 28 June 2019 'fixant les conditions d'agrément comme entreprise agricole et comme entreprise sociale' [laying down the conditions for the accreditation as agricultural company and as social enterprise], MB 11 July 2019):

- Its articles of incorporation must specify its object, which must serve to generate a positive societal impact for human beings, the environment or society.
- Similarly to social purpose companies, financial advantages that are distributed to the shareholders cannot exceed the interest rate established in execution of the Law of 20 July 1955. The interest rate is currently set at 6% of the shareholders'contributions.
- An asset lock is imposed. A departing shareholder may not receive more than the nominal value of their contribution. In the event of liquidation of the company, after all liabilities have been cleared and the shares repaid, liquidation proceeds must be allocated as closely as possible to its goal[84] as a social enterprise. However, if the company continues to exist but stops (voluntarily or not) being accredited as a social enterprise, the asset lock provisions cease to apply. This is considered to be a major loophole in the legal regime that would require the adoption of a new law to be fixed.[85]
- Directors cannot be remunerated unless the general meeting decides to grant a limited compensation or limited attendance fees.
- No shareholder can hold more than 10% of the voting power at the general meeting.
- Dividends can only be paid to shareholders after setting an (unspecified) amount which the company retains to carry on the necessary or useful projects for the accomplishment of the company's object.

The board of directors annually drafts a special report to describe how the cooperative company has fulfilled the conditions for accreditation as a social enterprise, as well as the activities carried out and the means adopted by the company to achieve its object.

Ultimately, social economy actors who adopt the cooperative company form can choose between (i) no accreditation, (ii) accreditation (pursuant to the Law of 20 July 1955), (iii) accreditation as a social enterprise, or (iv) both the accreditation and the accreditation as a social enterprise.

Even without considering the flaws in the drafting of the legal texts,[86] this system of rules creates more confusion than clarity and hardly enables the general public to get a clear view of the cooperative landscape. It therefore fails to fulfil the objective of regrouping the social economy sector under a widely recognized label.

[84] While the legal text refers to the object, this should more accurately be read as a reference to the goal of the company (Cools 2021).

[85] Cools (2021).

[86] Simonart (2022).

7 Conclusion

This chapter gives a contrasting picture of the third sector in Belgium. There is an active, developed and prosperous third sector. There are also legal structures under Belgian law to accommodate these activities. The legal system even offers a wide choice of solutions, which should enable everyone to find one that is adapted to their needs or situation.

However, both the evolution of the rules over time and their current configuration show that the overall design is not sufficiently coherent. One reason is probably the incremental nature of the construction: once a structure is created and used by some, it becomes difficult to repeal it completely when a reform is made. Another reason is clearly the considerable influence of social economy actors on policy makers, which ultimately leads to reforms and amendments implementing many particular requests, even if this is detrimental to the coherence or readability of the overall system.

Nonetheless, from a pragmatic point of view, the system generally works to the satisfaction of the relevant actors. Some of them would like to see some specific improvements (several of which would, indeed, be desirable), but no significant force is arguing for a fundamental (new) reform of the associative and corporate structures. The experiments carried out in Belgium and the ideas developed there—even when they fail—can serve as inspiration for other countries.

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