The Belgian Private Limited Without Capital: How is it Faring?

by

HENRI CULOT*

The new Belgian Code of Companies and Associations, enacted in 2019, abolished the use of capital in the limited liability company. This important reform led to various changes in the rules applicable to this type of company, although several aspects of the previous regime generally associated with the concept of capital still remain in place.
This article briefly describes the changes made in 2019 (2.) but also recalls the rules that have not been substantially modified (3.). It then brings together some observations on the economic players' behaviour after almost four years of practice under the new rules (4.).

Table of Contents ECFR 2023, 1–26

* Professor at UCLouvain, member of the Brussels Bar (Prioux Culot + Partners). Orcid 0000-0002-3421-6542. Parts 2 and 3 of this article are based on a contribution previously published in French by the same author (La SRL sans capital: quels sont les (réels) changements?, in: Olivier Caprasse/Henri Culot/Xavier Dieux (eds.), Le nouveau droit des sociétés et des associations. Le CSA sous la loupe, 2019, p. 153–182).

1. Introduction

The new Belgian Code of Companies and Associations (CCA), enacted in 2019, abolished the use of capital in the limited liability company.[1] This change can be considered radical, compared to those favoured by other countries, which have instead chosen to retain the concept of capital while reducing the minimum required amount. On the other hand, a closer look at the rules applicable to the Belgian LLC since 2019 shows that the changes are less revolutionary than it may seem at first sight. Indeed, even without a capital, it remains essential to protect the creditors of LLCs and some of the rules formerly attached to the capital system have been retained for this purpose. Some of these rules have been adapted or strengthened. An important novelty is the introduction of a liquidity test when deciding on distributions to shareholders.

The new rules were expected to lead to a change in the behaviour of economic actors. Even if we lack sufficient hindsight to draw definitive conclusions, it can already be affirmed that the business world choses overwhelmingly the new LLC and has adopted its new rules without any noticeable difficulty. However, some of the new possibilities allowed by the reform are still unknown or are unattractive due to their tax regime.

This article briefly describes the changes made in 2019 (2.) but also recalls the rules that have not been substantially modified (3.). It then brings together some observations after almost four years of practice under the new rules (4.).

2. The real changes

2.1. Suppression of (Minimum) Capital

2.1.1. Principle of Capital Suppression

No capital in the LLC. The decision was taken to completely abolish the capital in the private LLC. Therefore the capital is not maintained, even with a very low or symbolic minimum amount, nor do the shareholders have the choice of whether or not to provide for capital. The suppression of capital takes the form of a *prohibition* to provide for capital in the LLC. The absence of capital thus becomes an essential element of the LLC and is now part of its definition (Art. 5:1 CCA). Companies that want to have capital have to take

1 The limited liability company (LLC) to which this article refers is named "société à responsabilité limitée" (SRL) in French and "besloten vennoootschap" (BV) in Dutch. It is governed by Book 5 of the CCA.

another form, especially that of the public limited company (*société anonyme (SA) / naamloze vennootschap (NV)*).

However, it is not forbidden to use techniques which resemble capital or which fulfil the same or similar functions, but without bearing the name of capital. In particular, reserves which may not be distributed can be set up in the articles of association or by a decision of the general assembly, deciding under the conditions required for the amendment of the articles of association (i.e. 75% majority of votes). This results in the blocking of a certain amount of equity, which may not be distributed to the shareholders by the general assembly acting under ordinary conditions, let alone by the board of directors. Moreover, nothing prevents the company or its shareholders from contractually agreeing to comply with certain formal or substantive conditions before deciding on a distribution.

Additional contributions. Since the capital no longer exists, the articles of association contain no indication of the amount of capital. As a result, the company's equity can be increased by additional contributions from the shareholders, without this involving an amendment to the articles of association. The general assembly can therefore take the decision by an absolute majority (Art. 5:120, para. 2 CCA). However, the number of shares and the rights conferred on their holders are determined by the articles of association. If new contributions lead to the creation of new shares, the articles of association must be amended.

Similarly, the general assembly, acting by an absolute majority, may reduce the equity by a distribution to the shareholders. Amounts which do not stem from the past profits of the company, but from a contribution of the shareholders, may also be distributed under the same conditions. This replaces the reduction of capital.[2]

2.1.2. Consequences of Suppression

The abolition of the capital entails various consequences.

Minimum. Firstly, if there is no capital, there is no minimum capital either. The previous threshold of EUR 18,550 thus disappeared. This absence of a minimum applies not only at the time of incorporation, but also throughout the life

2 *Diederik Bruloot/Jean-Marie Nelissen Grade*, Schuldeisersbescherming in de BV na de afschaffing van het kapitaal concept, in: Hans De Wulf/Marieke Wyckaert (eds.), Het WVV doorgelicht, 2021, p. 55, 64.

of the company. Subject to the rules on distribution (see *infra*), there is no requirement to maintain a certain amount of equity in the company.

Still, a contribution is required to become a shareholder (Art. 1:8 and 5:40 CCA), and the limited liability company must have at least one shareholder. At the time of incorporation, the company therefore has some equity, however small, as a counterpart to the contributions of its shareholders. However, no minimum amount is required and, most importantly, the value of these contributions is not locked into the company. It can be distributed to shareholders at any time, according to the rules for dividend distribution.

Paid-up shares. Secondly, the suppression of the capital also implies that there is no minimum amount to be paid up at the time of incorporation. The new rule provides that shares must in principle be paid up immediately, but this is a purely suppletive rule (Art. 5:8 CCA). The articles of association or the deed of contribution may provide for the manner of payment, including making the payment dependent on a subsequent decision of a corporate body, which may well not call for the payment of the contributions during the entire existence of the company. Thus, there is no longer a minimum amount to be paid up, whether it is fixed as an absolute amount (EUR 6,200 or EUR 10,400) or as a relative amount (one fifth of each share) as was previously the case (Art. 223 of the Companies Code of 1999).

Capital as a benchmark. Thirdly, it was necessary to find substitutes for the various rules that referred to the amount of capital. Several strategies were deployed in this respect. Sometimes the amount of capital was replaced by the number zero, which is logical when capital is suppressed. This is for example the case in the solvency test for distributions (Art. 5:142 CCA; see *infra*). In other cases, the proportion of capital was replaced by a proportion of the number of shares, e.g. in order to determine which minority shareholders may sue the directors for damages (Art. 5:104 CCA). Thirdly, it was sometimes necessary to 'rebuild' a concept of capital in all but the name, in particular in order to define the maximum amount of the cash payment in the event of a merger or demerger (e.g. Art. 12:2, para. 2 CCA). Previously, Article 671 of the Companies Code of 1999 set the maximum amount of the cash payment at 10% of the nominal value or par value of the allocated shares, the par value being the quotient obtained by dividing the amount of capital by the number of shares. A par value is not conceivable for shares of a company without capital.[3] Finally, capital has also been replaced by the concept of equity, e.g. in the context of the requirement of sufficient equity at the time of incorporation (Art. 5:3 CCA; see *infra*).

3 Bill introducing the Code of Companies and Associations, Explanatory Memorandum, *Doc. Parl.*, Ch. repr., 2017-2018, DOC 54 3119/001, p. 130.

2.1.3. Authorisation of Contributions in Services

"Economically assessable" contributions. The capital system is based on the principles set out in the second Company Law Harmonisation Directive, which now appear in Title I, Chapter IV of Directive (EU) 2017/1132 relating to certain aspects of company law.[4] This chapter of the Directive formally applies only to public limited companies (SA / NV), but Belgium had previously chosen to use its principles to set the capital rules for limited and cooperative companies as well. Among these principles was the idea that contributions in services could not be used to form the capital: "Subscribed capital may be formed only of assets capable of economic assessment. However, an undertaking to perform work or supply services may not form part of those assets."[5] Thus, this type of contribution was not prohibited as a contribution, but it could not be remunerated by securities representing the capital, i.e. by shares. This is still the rule for the public limited company (art. 7:6 and 7:58 CCA).

Contributions in services are now allowed in the new LLC.[6] Such contributions give the right to receive ordinary shares, being understood that, as there is no capital, the shares do not represent the capital.

Contributions in services are defined as a subcategory of contributions in kind, which makes them subject to the rules governing the latter, and in particular to the obligation to have their value checked by an auditor (Art. 1:8, para. 2 and 5:7 CCA).[7] Henceforth, contributions in services come with a significant procedural burden, whereas other techniques are possible – and will be all the easier under the CCA – for remunerating a shareholder's services by means of company rights or distributions.

In tax law, capital remains even for LLCs. However, the adaptation of tax law to the new CCA rules was made in the sense that contributions in services do not constitute capital for *tax purposes*.[8] This tax treatment is rather disadvanta-

4 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 on certain aspects of company law, O.J. L 169/46.

5 Art. 46 of Directive (EU) 2017/1132.

6 *Henri Culot*, Quelques règles nouvelles concernant la SRL, la SC et la SA, in: Henri Culot (ed.), Le Code des sociétés et des associations (pour qui n'en a pas encore entendu parler), 2020, p. 45.

7 *Bruloot/Nelissen Grade* (fn. 2), p. 52.

8 Art. 2, § 1, 6° of the CIR 92, as amended by the law of 17 March 2019 adapting certain federal tax provisions to the new Code of Companies and Associations, *Moniteur belge* (official journal), 10 May 2019, p. 45450. On the tax consequences of this rule, see *Renaud Thonet*, Les conséquences fiscales de la réforme du Code des sociétés et des associations, in: Vanham & Vanham Seminar, Le nouveau Code des sociétés: une réforme fondamentale aux impacts majeurs pour les entreprises, Brussels, 9 May 2019, p. 13–14;

geous; as a result, it was forecasted that contributions in services would not be very successful (see *infra*).[9]

2.1.4. Accounting Aspects

Replacement of capital by "contribution". The abolition of the capital has repercussions in terms of accounting law. The capital was indeed a traditional item in the balance sheet of LLCs. It has now disappeared. In the model balance sheet annexed to the Royal Decree implementing the Code of Companies and Associations, the capital item is replaced within the broader category named "equity" by an item called "contribution".[10] This "contribution" item is subdivided into two sub-items: the available contribution and the unavailable contribution, the latter being the contribution which the articles of association or the general assembly declares can only be distributed by a decision taken in accordance with the conditions for amending the articles of association (i.e. 75% majority of votes).

In the public limited company, the accounting item called "contribution" is subdivided into "capital contribution" and "non-capital contribution".[11]

Contributions in services. Contributions in services do not appear in the aforementioned Royal Decree. The explanatory report mentions that they are not "relevant" "from an accounting point of view".[12] These contributions, which will generally result in the allocation of shares, will thus not appear as such in the company's accounts. Indirectly, however, they will contribute to increase the equity: presumably the company's annual result will be all the more positive because the company will have benefited from a workforce that is not remunerated by a salary or by a director's remuneration, but by shares, which are not expenses in its profit and loss account. Of course, the owner of

Daniel Garabedian/Renaud Thonet, La société à responsabilité limitée (SRL) et l'impôt, in: André-Pierre André-Dumont/Thierry Tilquin (eds.), La société à responsabilité limitée, 2019, p. 327–328.

9 *Henri Culot*, La SRL sans capital: quels sont les (réels) changements?, in: Olivier Caprasse/Henri Culot/Xavier Dieux (eds.), Le nouveau droit des sociétés et des associations. Le CSA sous la loupe, 2019, p. 165.

10 Annex 3 to the Royal Decree of 29 April 2019 implementing the Code of Companies and Associations, *Moniteur belge* (official journal), 30 April 2019, 2nd edn., p. 42408.

11 Annex 3 to the Royal Decree of 29 April 2019 implementing the Code of Companies and Associations.

12 Report to the King preceding the Royal Decree of 29 April 2019 implementing the Code of Companies and Associations, *Moniteur belge* (official journal), 30 April 2019, 2nd edn., p. 42256.

the shares may receive a dividend, which reduces the equity, in the same way as a distribution from a contribution account.

2.2. Distributions

The second important change to the rules on limited liability companies resulting from the suppression of capital concerns the rules on distribution.

2.2.1. General Principle: All Equity is Distributable

Distributable equity. The main purpose of the concept of capital is to maintain a certain level of equity in the company, at least as far as the relationship between shareholders and creditors is concerned. It thus sets a limit, in the interest of creditors, on the amount of the company's equity that the shareholders can decide (through a decision of the general assembly) to allocate to themselves.

This limit disappears with the suppression of capital. More precisely, the limit must be defined differently, because the project of the Code's drafters never envisaged to allow for the shareholders to distribute the company's equity without any limit.

Nevertheless, the abolition of the capital implies that all the equity of the company is in principle distributable to the shareholders, even the equity which has been contributed by the shareholders.

Non-distributable equity. However, the law, the articles of association or the general assembly may forbid the distribution of part of the equity. This is still a legal obligation in the case of the acquisition of own shares and in the case of financial assistance (art. 5:148, para. 2 and 5:152, para. 1 CCA).

The articles of association or the general assembly may decide that certain contributions or reserves are not distributable or, at least, not under the ordinary conditions under which the general assembly takes its decisions. It is possible that in the future some creditors will require the creation of such a reserve as a condition for granting credit. In this respect, the articles of association may provide for all sorts of more or less demanding terms and conditions, substantive or procedural, to which they subject the distribution of such amounts.[13]

13 *Henri Culot*, Clauses d'apport et dissociation entre les droits politiques et financiers attachés aux actions de SRL, in: Edouard-Jean Navez (ed.), Le nouveau droit des sociétés et des associations. Analyse critique et modèles de clauses commentés, 2019, p. 293; *Culot* (fn. 9), p. 160.

2.2.2. Double Test and Decision by Two Corporate Bodies

As limit to distributions associated with the capital disappeared, it was necessary to redefine the conditions for distributions. The new criteria apply to all distributions, whether they are distributions of contributions or of profits, and whether they benefit shareholders (dividends) or directors (directors' fees).[14]

As recommended by renowned authors,[15] the new formula involves a double test. The decision of two corporate bodies is required.[16]

Solvency test. On the one hand, the general assembly must decide on the distribution on the basis of a solvency test (Art. 5:142 CCA). This test is similar to the old distribution test, but in which the amount of capital would have been replaced by the number zero. Thus, the general assembly may decide to distribute dividends provided that, as a result of this distribution, the company's net assets do not become negative (i.e., less than zero, whereas before they could not fall below the amount of capital).[17] If the company has non-distributable equity, the net assets may not fall below the amount of the non-distributable equity, which fits with the very definition of not being distributable.

Net assets are defined as total assets minus provisions and liabilities, as well as in principle the amount of start-up and expansion costs and research and development costs, insofar as they have not been depreciated (Art. 5:142, para. 3 CCA). This does not change in comparison with the previous rules.

In principle, this test should be based on the latest annual accounts approved by the general assembly. Typically, the decision on distributions is taken at the ordinary general assembly, just after the approval of the annual accounts. However, this does not need be the case: the general assembly may decide on a distribution at any time during the financial year.[18]

14 For the sake of simplicity, we will refer in this article to "distribution" or "dividend", on the understanding that the rules applicable to dividends also apply to directors' fees (*tantièmes*).

15 Among others *Wolfgang Schön*, "Balance sheet tests or solvency tests – or both?", European Business Organization Law Review 2006, 181. In Belgian law, the reform of the LLC with regard to capital is based on the work of *Diederik Bruloot*, Vennootschapskapitaal en schuldeisers, 2014, 824 p.

16 *Herman Braeckmans/Robby Houben*, Handboek vennootschapsrecht, 2nd edn., 2020, p. 576–580; *Bruloot/Nelissen Grade* (fn. 2), p. 56–66; *Culot*, Quelques règles nouvelles (fn. 6), p. 50 et seqq.; *Patrick De Wolf*, La SRL, une société sans capital mais dotée de règles (strictes) de protection des tiers, in: André-Pierre André-Dumont/Thierry Tilquin (eds.), La société à responsabilité limitée, 2019, p. 62–66.

17 *Bruloot/Nelissen Grade* (fn. 2), p. 59.

18 Cour de cassation de Belgique, 1re chambre, 23 January 2003, C010536F, Journal des Tribunaux 2003, 155.

The Code of Companies and Associations also allows the solvency test to be carried out on the basis of a more recent statement of assets and liabilities, which the company has had drawn up (5:142, para. 2 CCA).[19] This makes it possible (but not mandatory) to take into account more recent accounting data than the latest annual accounts. If profits have been made since the closing date of the last annual accounts and before the approval of the next annual accounts – which often covers a period of almost 18 months – these profits can be distributed without waiting for the closing of the financial year and the approval of the accounts.[20] This process produces a result similar to that of the interim dividend, but with the proviso that it is a real dividend and not an interim payment. In other words, it is not an advance (possibly repayable) on a dividend that will be definitively decided at a later date, but a dividend that is immediately and irrevocably allocated, even if the company's situation later develops unfavourably in such a way that a distribution would no longer be possible on the basis of the balance sheet as it will be drawn up at the end of the financial year.

Liquidity test. Once the general assembly has decided on a distribution of dividend, it is then up to the directors to decide on its payment. In the past, the payment was more or less automatic. At most, the directors decided on the exact moment of the transfer, depending on the company's available cash.

Under the new rules, this payment is subject to the passing of a second test, called the liquidity test, which is the real novelty in this area. This test is the responsibility of the (board of) director(s) and involves verifying that, despite the payment of the dividend and according to reasonable expectations, the company will be able to pay its debts as they fall due during the twelve months following the distribution (Art. 5:143 CCA). In other words, the distribution must not lead the company to liquidity problems, such as those leading to judicial reorganisation proceedings or bankruptcy, within one year. Otherwise, the distribution decision taken by the general assembly is not effective and the dividend may not be paid.

The company is not required to possess the cash to pay all the debts that fall due in the year. It can take into account the expected cashflows during the relevant period, as well as the fact that not all debts will be due on the same date. Nor is there any requirement to anticipate events so far out of the ordinary that they should be considered reasonably unlikely, although the prudent

19 *Bruloot/Nelissen Grade* (fn. 2), p. 60.

20 Previously, the possibility of distributing profits from a closed financial year before the approval of the related accounts was controversial. See *Hans De Wulf*, "Moet de mogelijkheid tot winstuitkering volgens artikel 617 W. Venn. steeds aan de hand van de laatste jaarrekening berekend worden?", Revue de droit commercial 2005, 396.

directors will remember that the event that seemed highly unlikely before it occurred will seem much less so after it has happened. Similarly, a long-term perspective is not required, but only a twelve-month forecast, while drawing attention to the circumspection that must nevertheless prevail when more distant events, but clearly foreseeable or even actually foreseen, threaten the liquidity of the company.[21]

In order to be able to assess at a later stage whether the directors' decision was reasonable, they must justify it in a report, which is not published, but which can be used *a posteriori*. If the company has appointed an auditor, the auditor must assess the accounting and financial information in this report and state in his annual report that he has carried out this task.

The liquidity test has at least two structural differences from the solvency test, which make it more efficient to effectively protect the creditors of the company.

On the one hand, although it may be partly based on the figures of the annual accounts, it is not a simple arithmetic exercise based on identified accounting headings. Instead, it requires an assessment, a reasonable and prudent evaluation including a series of elements which cannot, or cannot necessarily, be reduced to a mathematical formula. This inevitably involves uncertainty, which may frighten those who are reassured by the exclusive use of pure accounting data.

The risks associated with this obligation to foresee and assess the future liquidity of the company sometimes leads to opt for the form of a public limited company, to which only the solvency test applies (Art. 7:212 CCA). However, running a company implies, at all times and on all issues, acting prudently and diligently to make reasonable decisions in a fundamentally uncertain context. The payment of dividends is not inherently different in this respect. Moreover, even if a liquidity test is not required to decide on distributions in public limited companies, it does not follow that one can, just because the solvency test turns out positive, distribute any amount to shareholders while neglecting the interests of creditors or the corporate interest.[22]

On the other hand, while the solvency test relates to the past (i.e. the company's past results as reflected in the balance sheet), the liquidity test requires looking ahead and anticipating the foreseeable future situation of the company. Except in obvious cases, a cashflow forecast is required to demonstrate that the

21 See Explanatory Memorandum (fn. 3), p. 178–179; *Diederik Bruloot/Henri Culot*, De kapitaalloze BV – La SRL sans capital, in: Le projet actuel du nouveau Code des sociétés et des associations, 2018, p. 109; *Culot*, Quelques règles nouvelles (fn. 6), p. 51.

22 See Président du Tribunal de commerce de Liège, 26 November 2013, *Tijdschrift voor Rechtspersoon en Vennootschap* 2014, 319. Suspending at the request of the company's workers a decision of the general assembly concerning the distribution of a dividend.

debts due can be paid.[23] As a result of these two elements, the liquidity test is more risky, as it is less certain than the solvency test. If in doubt, the safe decision for the directors is to forego the payment of the distribution, although this may not please the shareholders.

Concept of distributable amount. The distributable amount, in the sense of the Code of Companies and Associations, is the amount that meets the conditions of both tests or, to put it differently, the smallest amount acceptable under either test. This notion of distributable amount is used to decide on distributions, but also whenever, in other contexts, the Code of Companies and Associations refers to distributable amounts. This is the case, for example, for the acquisition of own shares or financial assistance (see *below*).[24]

2.2.3. Liabilities

The rules on distributions are sanctioned by civil and criminal liabilities.

Civil liability of directors. Directors who made a distribution when they knew or ought to have known that the conditions of the liquidity test were not met are jointly and severally liable for the resulting damage to the company or to third parties (Art. 5:144, para. 1 CCA).[25] This liability relates only to the correct performance of the liquidity test; the decision on the distribution based on the solvency test is a matter for the general assembly and the directors are not liable for it.[26]

Obligation of shareholders to repay. Shareholders who, even in good faith, received a dividend when the conditions of one of the two tests were not fulfilled, may be ordered to repay what they received, or at least the part that exceeds the maximum they could lawfully receive (Art. 5:144, para. 2 CCA). Shareholders acting in good faith are those who could reasonably believe that the conditions were fulfilled – even if, hypothetically, they were not. *A fortiori*, shareholders who knew that the conditions were not fulfilled may also be obliged to repay.[27]

The fact that good faith does not allow one to escape this liability is understandable in the general logic of limited liability companies, where creditors are

23 Explanatory Memorandum (fn. 3), p. 179.
24 *Culot*, Quelques règles nouvelles (fn. 6), p. 50.
25 *Bruloot/Nelissen Grade* (fn. 2), p. 65.
26 However, see below with regard to criminal liability, which, as is well known, can also have civil effects.
27 *Bruloot/Nelissen Grade* (fn. 2), p. 65–66.

in principle given priority over shareholders. The latter, whatever their state of mind, have received money that should not have gone to them.

It may however be difficult and costly for the company (or its trustee in case of bankruptcy) to recover dividends if they have been paid to a large number of shareholders. If the amount per shareholder is small, the procedural steps to be taken may be disproportionate. But this will less be the case if, as in many SMEs, the number of shareholders is small.

Criminal liability of directors. Finally, while the Code of Companies and Associations did not keep most of the criminal provisions previously contained in the Companies Code of 1999, it has retained some punitive sanctions, including that for unlawful distribution. According to Article 5:158, 3° CCA, directors who have contravened Article 5:142 (solvency test) or 5:143 (liquidity test) will be liable to a fine of EUR 50 to EUR 10,000, or even up to one year imprisonment.[28]

2.3. Exclusion and Resignation

The absence of capital, meaning that contributions can be taken back by the shareholders, also makes it possible to provide for resignation and exclusion mechanisms in the LLC. The articles of association can thus allow the shareholders to leave the company by taking back their share of the equity. Similarly, the company may decide to exclude a shareholder by returning his share of the equity. The shares of the departing shareholder are then destroyed. These are ultimately special cases of distributions to a shareholder.

The Code regulates the modalities and the procedure to be followed, but the articles of association can derogate from most of the legal provisions on this subject. In particular, they may specify the cases and times when shareholders may resign or be excluded and the calculation of the amount to be returned to the shareholder (Art. 5:154-5:156 CCA).[29]

28 *Henri Culot*, "Le Code des sociétés et des associations : une dépénalisation du droit des sociétés ?", Dr. pén. entr. 2020, 84–85.

29 See *Bruloot/Nelissen Grade* (fn. 2), p. 71–74; *Culot*, Quelques règles nouvelles (fn. 6), p. 68–69; *De Wolf* (fn. 16), p. 75–78; *Thierry Tilquin*, La démission et l'exclusion : ébauche d'une SRL à capitaux propres variables, in: André-Pierre André-Dumont/ Thierry Tilquin (eds.), La société à responsabilité limitée, 2019, p. 245–277.

3. What Does Not (Really) Change

Despite the suppression of capital, some of the previous rules remain very similar.

3.1. Sufficient Initial Capital and Liability of Founders

Summary of the previous regime. In addition to the minimum capital requirement, the notion of "sufficient capital" was previously used. It implied to ensure that the capital was sufficient to enable the company to carry out its intended activity during the first two years of its existence, taking into account other sources of financing.[30] The amount of sufficient capital had to be established in a financial plan submitted to the notary, but not published (Art. 215 Companies Code). If the company was declared bankrupt within three years of its incorporation and if it turned out that the capital provided for at the outset was manifestly insufficient, the judge could charge all or part of the liabilities of the bankruptcy to the founders (Art. 229, 5° Companies Code).

From a substantive point of view, the system has not changed, but it has been adapted and strengthened to compensate for the suppression of capital.[31]

Positive obligation. The Code of Companies and Associations now contains a positive obligation to provide the company with sufficient equity (Art. 5:3 CCA). Previously, this obligation was only indirectly derived from the liability rule which applied in the opposite case, if the insufficiency was manifest. From a strictly legal point of view, the difference is slight, but the formulation of a positive obligation may have a symbolic impact and may in practice draw more attention to the founders' obligation.

Equity. It is no longer a question of sufficient capital, but of sufficient equity, which is a logical consequence of the suppression of capital. Unfortunately, this slightly blurs the message, at least for non-specialists. Telling the start-up entrepreneur that he or she no longer has to provide a minimum 'capital', but that the company must have sufficient 'equity' is more or less the same thing. It is important to highlight the fact that the amount of initial equity can be adapted to the particularities of each company, mainly the financing that its

30 *Marc Fyon*, Le capital social : une notion en voie d'érosion ?, in: Georges-Albert Dal/Marc Fyon (eds.), Le droit des sociétés aujourd'hui: principes, évolutions et perspectives, 2008, p. 86; *Henri Culot*, "Plan financier et avances d'associé", Revue de droit commercial 2016, 470–472.

31 Explanatory Memorandum (fn. 3), p. 128; *Bruloot/Culot* (fn. 21), p. 102–105; *Bruloot/Nelissen Grade* (fn. 2), p. 49.

activity requires and the alternative sources of financing on which it can rely, including in particular the loans that its shareholders (or others) might grant.

Financial plan. The financial plan must still be drawn up, but it is legally "reinforced". By this was meant that whereas the previous Code did not impose anything on its content,[32] the CCA now indicates seven headings that the financial plan must contain (art. 5:4, para. 2 CCA):[33]

"1 *a precise description of the planned activity;*
2 *an overview of all sources of funding at the time of incorporation, including, if applicable, a mention of the guarantees provided in this respect;*
3 *an opening balance sheet* [...] *and projected balance sheets after twelve and twenty-four months;*
4 *a projected profit and loss account after twelve and twenty-four months* [...];
5 *a budget of projected income and expenditure for a period of at least two years from the date of incorporation;*
6 *a description of the assumptions made in estimating the expected turnover and profitability;*
7 *where applicable, the name of the external expert who assisted in drawing up the financial plan.*

It was therefore expected that financial plans would be drawn up in a more serious manner than before.[34] This is often the case in practice, as notaries have to ensure that the financial plan's content complies with the legal requirements, at least as regards the existence of the various headings.

The strengthening of the financial plan means that it is more difficult than before for non-specialists to draw it up themselves. In order not to increase incorporation costs,[35] the Code of Companies and Associations does not require

32 Except in the special case of Art. 219*bis* et seq. of the Royal Decree of 30 January 2001 implementing the Companies Code.

33 The Accounting Standards Committee (*Commission des norms comptables / Commissie voor boekhoudkundige normen*) published a technical note clarifying the legal text on several points and containing a concrete example of a financial plan (*Plan financier pour les sociétés à responsabilité limitée, coopératives et anonymes*, Note technique du 4 mars 2020, NT 2020/04, https://www.cnc-cbn.be/fr/avis/note-technique-plan-financier-pour-les-societes-a-responsabilite-limitee-cooperatives-et, last accessed 20 June 2023).

34 Some financial plans were incomplete or inconsistent. See e.g. Hof van Beroep Gent, 26 June 2017, *Le droit des affaires – Het ondernemingsrecht* 2017, n° 124, 30, where the founders drew up a financial plan for a shop while the company subsequently operated a restaurant; the financial plan also failed to provide for gas and electricity expenses.

35 Explanatory Memorandum (fn. 3), p. 129.

to hire a professional accountant,[36] but only that the name of the accountant, if any, be indicated in the plan. Given the complexity of the requirements and the risks involved, prudent founders, either on their own initiative or convinced by their notary, have more recourse than previously to a professional to assist them. On balance, the additional cost is probably worth it in view of the liability risks at stake.

The mechanism and conditions of founder's liability have not changed substantively.[37] If the company files for bankruptcy within three years of its incorporation, the court may declare the founders personally liable for (a maximum of) all the liabilities of the bankruptcy, if the initial equity of the company was manifestly insufficient for the company to carry out its intended activity during the first two years. The financial plan will help the judge to assess the mindset of the founders at the time of incorporation.

3.2. Control of Contributions in Kind

Valuation by an auditor. As was the case before, the value of contributions in kind must be audited by an auditor. The *goldplating* resulting from the application of the Company Law Directive beyond its scope, which was denounced by the authors of the draft Code,[38] continues in this respect. The exceptions introduced into Belgian law in 2008 are also maintained.[39]

36 *Roman Aydogdu/Lorène Nickels*, La société à responsabilité limitée et les autres formes de sociétés, in: Roman Aydogdu/Olivier Caprasse (eds.), Le Code des sociétés et des associations. Introduction à la réforme du droit des sociétés, 2018, p. 70.

37 On this liability, see *Braeckmans/Houben* (fn. 16), p. 516–520; *Olivier Caprasse*, La responsabilité des fondateurs en cas de capital insuffisant, in: Bernard Tilleman/Anne Benoit-Moury/Olivier Caprasse/Nicolas Thirion (eds.), La constitution de sociétés et la phase de démarrage d'entreprises, 2003, p. 573–589; *Yves De Cordt* (ed.), Société anonyme, 2nd edn., 2021, p. 40–43; *Aurore Jansen/Wim David*, "Le nouveau droit des SRL et de la faillite : quelles (inter)actions ?", Revue pratique des sociétés – Tijdschrift voor Rechtspersoon en Vennootschap 2020, 450–473; *Thierry Tilquin/Valérie Simonart*, Traité des sociétés, vol. III, 2005, p. 590 et seq.

38 Explanatory Memorandum (fn. 3), p. 6.

39 These exceptions derive from Article 50 of Directive (EU) 2017/1132. See *Sven Bogaerts/Runa Vander Eeckt*, "Nieuw kapitaalrecht – Van kapitaal belang ? Knelpunten bij de gewijzigde regels inzake inbreng in natura, quasi-inbreng, verkrijging van eigen effecten en financiële steunverlening", Tijdschrift voor Rechtspersoon en Vennootschap 2009, 239–241; *Herman Braeckmans*, "Versoepelingen in het Wetboek Vennootschappen : inbreng in natura, inkoop van eigen aandelen en financiële bijstand (K.B. van 8 oktober 2008)", R.W. 2008–2009, 1627–1630; *Arnaud Coibion/Gabriela de Pierpont*, Assistance financière, rachat d'actions propres et apports en nature: assouplissement nécessaire ou coup d'épée dans l'eau?, in: Yves De Cordt/André-Pierre André-Dumont

However, there are some minor differences.[40]

Reports. Firstly, article 5:7, para. 1 CCA articulates more logically the founders' report and the auditor's report. The founders must first draw up a draft report which describes each contribution in kind, explains its interest for the company and justifies the value of the consideration granted to the contributor. The auditor then intervenes and checks whether the value attributed by the founders to the contribution and its remuneration corresponds at least to the real value. The founders then finalise their report, stating whether or not they deviate from the auditor's conclusions.

Contributions in services. Secondly, this valuation procedure also applies to contributions in services, which are now allowed in the LLC and considered to be a subcategory of contributions in kind.[41] This valuation is only relevant for the relationship between shareholders, since the contributions in services are not included in the balance sheet of the company.[42] As already mentioned, contributions in services are rare in practice, which is partly due to the difficulty to properly assess their value.

Substantial acquisition after incorporation. Thirdly, the specific procedure formerly provided for in the case of substantial acquisition after incorporation[43] no longer exists in the LLC[44] (although it remains applicable in the public limited company). In short, the aim was to avoid circumventing the obligation to value contributions in kind by carrying out substantially the same operation through a cash contribution followed by a purchase by the company of assets belonging to the founders, partners or directors (Art. 220–222 of the Companies Code).

(eds.), Droit des sociétés – Millésime 2011, 2011, p. 51–62; *Henri Culot/Pierre-Yves Thoumsin*, "Contrôle et maintien du capital: une réforme sans audace", Journal des tribunaux 2009, 93–99.

40 See *Hans De Wulf*, "De implicaties van het wetboek van vennootschappen en verenigingen voor de opdrachten van de commissaris bij vennootschappen: enkele opmerkingen", Tax, audit and accountancy 62 (2019), 12.

41 On the auditor's mission in case of contribution in services, see *Claudio Balestra/Raymond Ghysels*, "Apport en industrie *quo vadis*", Tax, audit and accountancy 64 (2019), 28–31.

42 See *above* and Report to the King preceding the Royal Decree of 29 April 2019 implementing the Code of Companies and Associations, p. 42256.

43 See Art. 52 of Directive (EU) 2017/1132.

44 *Aydogdu/Nickels* (fn. 36), p. 68; *Culot* (fn. 9), p. 177. For a criticial stance, *Braeckmans/Houben* (fn. 16), p. 532; *Michel De Wolf*, "Le rôle renouvelé du réviseur d'entreprises dans la société à responsabilité limitée", Revue pratique des sociétés – Tijdschrift voor Rechtspersoon en Vennootschap 2020, 411–412.

This type of transaction is no longer subject to a specific procedure. In some cases, especially if the acquisition directly or indirectly involves a director of the company, the conflict of interest procedure (Art. 5:76-5:78 CCA) could apply.[45]

Additional contributions. The rules for the valuation of contributions in kind also apply if the contributions are made after the incorporation of the company rather than at the time of incorporation. This is referred to as 'additional contributions', which corresponds *mutatis mutandis* to the former capital increase (Art. 5:133 CCA).

It is not allowed to waive the reports, even by unanimity. In a system without capital, where creditor protection is based on other mechanisms, it may be justified to impose a check on the value of contributions in kind, but only in the interest of the shareholders and, in particular, of the shareholders who do not contribute in kind or, in the case of additional contributions, of the minority shareholders who contribute nothing.[46] The obligation to value also those contributions which, like contributions in services, do not appear on the company's balance sheet, confirms that indeed the interest of the shareholders is at stake here.

It should then be possible for the shareholders to unanimously waive the obligation to have the report drawn up, in particular the auditor's report.[47] The situation is particularly obvious in the case of a single shareholder: why should she have to go through an auditor to check the value of what she contributes?

However, the new Code very consciously[48] decides otherwise, although the reason for this is not fully clear.[49] The accounts of the company must comply with the true and fair view principle, but this applies to all assets and not only to the assets contributed. In the case of a merger, which is a similar case in many respects, the shareholders can unanimously waive the audit report (Art. 12:26, para. 1 CCA).

45 *Aydogdu/Nickels* (fn. 36), p. 68; *Bruloot/Nelissen Grade* (fn. 2), p. 52.

46 On the dangers of overvaluing contributions in kind, see *De Cordt* (fn. 37), p. 48–49.

47 Council of State, 9 October 2017, Opinion 61.988/2, Doc. Parl., Ch. repr. 2017–2018, DOC 54 3119/002, p. 57–59.

48 Explanatory Memorandum (fn. 3), p. 130.

49 For a more detailed discussion, *Bruloot/Nelissen Grade* (fn. 2), p. 51; *Henri Culot*, "La suppression du capital dans la société à responsabilité limitée", Revue de droit commercial 2018, 973–974; *De Wolf* (fn. 16), p. 48–49; *Jean Fonteyn*, "Ne dites plus 'capital', dites 'capitaux propres'", Revue pratique des sociétés – Tijdschrift voor Rechtspersoon en Vennootschap 2019, 276; *Aydogdu/Nickels* (fn. 36), p. 68; *Jean-Marc Gollier/Simon Flament*, "La SRL et son patrimoine, vers une société plus durable", Le droit des affaires – Het ondernemingsrecht 131 (2019), 11.

In any case, the rule is clear: the auditor's report may not be waived, even unanimously, in the case of a contribution in kind.

3.3. Safeguards as Regards the Company's Assets

What used to be called the safeguard of the company's capital becomes the safeguard of its assets, but the main rules that existed previously remain in place.

3.3.1. Acquisition of Own Shares

Principle. The conditions for the acquisition by the company of its own shares do not differ much from those previously laid down, which are broadly derived from the requirements of the Directive (EU) 2017/1132. They are therefore also similar to the requirements for a public limited company (Art. 7:215 et seq. CCA).

However, some adjustments are planned.

Majority. The majority required at the general assembly to authorise the acquisition of own shares is now the majority required for the amendment of the articles of association, i.e. in principle 75% of the votes (Art. 5:145 para. 1 CCA).

No maximum. The limit, previously set at 20% of the subscribed capital (Art. 322, 1° Companies Code), is abolished.[50] The company may therefore, in principle, purchase as many of its own shares as it wishes, provided that it complies with the other conditions and maintains at least one share with voting rights (Art. 5:40 CCA). Holding the general assembly would be particularly problematic if all the shares issued were owned by the company. Besides, it is not clear what interest the last shareholder would have in selling his last share to the company.

Distributable amounts. As before, the acquisition can only be carried out with distributable amounts but, as mentioned above, the notion of distributable amount has been modified by the introduction of the liquidity test.[51]

Consequences of acquisition. An LLC that has acquired its own shares may cancel them, keep them or resell them. All three possibilities are now explicitly regulated (Art. 5:148-5:151 CCA). Cancellation requires a decision of the gen-

50 *De Wolf* (fn. 16), p. 69.
51 *Aydogdu/Nickels* (fn. 36), p. 71.

eral assembly under the conditions required for the amendment of the articles of association. If the shares are kept in the portfolio, the voting rights are suspended and the right to dividends lapses. There is no longer any requirement to resell the shares within a certain period of time, but the sale of the shares requires in principle a decision of the general assembly with the majority required for the amendment of the articles of association and the observance of a preferential right in favour of the existing shareholders.

3.3.2. Financial Assistance

Also for financial assistance, the Companies and Associations Code mainly refers to the rules of Directive (EU) 2017/1132. The regime is close to the one applicable to the public limited company.

Acceptance of the company's own shares as security. The CCA no longer provides for specific rules on the acceptance of an LLC's own shares as security.[52] This is therefore an operation which is no longer specifically regulated. It must, of course, be carried out in accordance with the company's interests and, where applicable, the rules on conflicts of interest.

Advances of funds, loans and securities. The company may only grant financial assistance for the acquisition of its shares with the authorisation of the general assembly, given under the conditions required for the amendment of the articles (Art. 5:152, para. 1 CCA). The board of directors must draw up a report in which it justifies the transaction and its conditions. This report no longer has to be published, contrary to what was required by the Companies Code. Assistance can only be provided by means of distributable amounts, a concept whose meaning has evolved as previously mentioned.[53]

3.3.3. Alarm Bell

When should it be pulled? The alarm bell mechanism remains as it existed previously, but is influenced by the new distribution rules. As a reminder, the alarm bell is the rule that requires the directors to convene the general assembly when the company's activities are in jeopardy, in order to propose its dissolution or measures to rectify the situation.

52 *De Wolf* (fn. 16), p. 73. Article 330 Companies Code previously governed this transaction.

53 *Aydogdu/Nickels* (fn. 36), p. 71; *Bruloot/Nelissen Grade* (fn. 2), p. 68; *De Wolf* (fn. 16), p. 71–72.

Previously, the Companies Code considered that the company was in a bad situation when the equity was reduced to less than half or even a quarter of the capital as a result of losses (Art. 332 of the Companies Code). Nowadays, the alarm bell has to be rung when the net assets become or are likely to become negative or when it is no longer reasonably certain that the company will be able to pay its debts due within the next twelve months, according to the developments that can reasonably be expected (art. 5:153 CCA).[54] Both criteria used for distributions can be recognized here, but considered in a negative sense.

Consequences. If the conditions for alarm bell are met, the directors must convene the general assembly so that it meets within two months. The directors must submit a report where they suggest measures to redress the financial situation of the company (preferably) or, failing that, propose its dissolution. A qualified majority is required to decide on the dissolution.

If the procedure has been correctly followed and the critical situation persists for the same reasons, the procedure does not have to be repeated until a period of one year has elapsed (Art. 5:153, para. 4 CCA).

4. Some Observations on Three Years of Practice

4.1. Covid and Other Crises Make it Impossible to Isolate the Effects of the Reform

The Companies and Associations Code came into force in May 2019 and applied to previously existing companies from 1 January 2020, in principle. Three months later came the covid-19 pandemic, which caused, among other things, major economic disruption. The pandemic was closely followed by the war in Ukraine and the energy crisis, which also have a significant impact on the economy.

While some developments can be observed in the field of companies, it is difficult to isolate the effects of the new rules brought about by the Code of Companies and Associations from those of the pandemic and the economic crisis. The transition did not take place in a normal world. Public authorities heavily subsidised businesses and a freeze on bankruptcy proceedings was (formally or informally) applied. This is therefore an important methodological *caveat* when trying to assess the effects of the new Code of Companies and Associations.

54 *Braeckmans/Houben* (fn. 16), 618–619; *Bruloot/Nelissen Grade* (fn. 2), p. 70; *Culot*, Quelques règles nouvelles (fn. 6), p. 55.

The following developments are based on a very informal empirical method, building on the author's own observations as an academic and a practitioner, completed by informal discussions with friends and colleagues also active in the field of company law.

4.2. Most New Companies Are Private LLC

Prior to the Companies and Associations Code, the LLC (SPRL/BVBA) was already the most popular company form. Its partners benefited from limited liability, while only being required to contribute a relatively modest capital (EUR 18,550, of which one third was to be paid up at the time of incorporation in principle). It was therefore the most suitable company for SMEs, which form the core of Belgium's economic structure. Nevertheless, some had reasons to choose the public company or the cooperative society, or, very marginally, one of the other corporate forms.

The Code of Companies and Associations reinforced this trend. Nowadays, hardly any company is formed that is not a private LLC (SRL/BV). According to Graydon, a data supplier company, 926 public limited companies and 39,330 private LLC were created in 2021. While it was still 1.73% in 2011, the share of public companies in new businesses has been falling steadily since then and has dropped below one percent in 2019, to 0.77% in 2021.[55]

Entrepreneurs who still choose for the public limited company do so for one major reason: to avoid the liquidity test in case of dividend distribution. This test is seen either as a risk that the distribution cannot take place as planned (e.g. in private equity arrangements) or as an additional risk of liability for the directors.

Some expected that the suppression of the capital requirement, which in practice means that an LLC can be formed with a symbolic contribution, would encourage individual enterprises (natural persons) to become companies. This is apparently not the case, at least not significantly. The proportion of new businesses that are natural persons remains above 55%. However, there has been a decline since 2019, from 60% to around 55%.[56] During the same period,

55 *Graydon*, Atlas du créateur, 2022, p. 20, https://graydon.be/fr/resources/etude/atlas-du-createur-2022 (last accessed 20 June 2023).

56 Part of this decline might be due to the law of 15 April 2018 on the reform of enterprise law, which qualifies liberal professionals as enterprises and therefore subjects them to the risk of bankruptcy. This is consistent with the fact that the increase in the number of incorporations is more significant in the liberal professions sectors, particularly among the medical professions (*Graydon* (fn. 55), p. 24).

the share of private LLCs has increased from 28.5% to almost 33%.[57] Partnerships (without limited liability) account for 6.55% of new businesses.

This shows that capital is an important obstacle to the decision to set up a company, but also that other barriers remain to the formation of LLC's: the costs (of notaries, accountants), the formalities to be complied with (more formal accounting, publications, etc.) and the publicity required for a company's deeds and accounts are probably also factors that lead economic actors to prefer to act as a natural person or in a partnership.

4.3. The Initial Equity of a Private LLC Is Generally Lower Than the Former Minimum Capital

A large number of LLCs are nowadays set up with a starting equity that is considerably lower than the former minimum capital (EUR 18,550). Founders usually choose round figures such as EUR 1,000, EUR 5,000 or EUR 10,000. A study covering the period between May 2019 (entry into force of the CCA) and December 2019 shows that 80% of new LLCs had a starting capital below the amount of the former minimum capital of LLC, and 50% of new LLCs had a starting capital below EUR 5,000.[58]

If the company needs more financing, shareholders often prefer to provide this financing in the form of a loan, which can be paid back without going through the formalities of dividend distribution and without any withholding tax.

An important exception is obviously the case of companies set up for estate planning reasons. Various mechanisms are used to ensure that the parents retain the use and control of the family assets until their death, after which the use and control passes to their heirs, avoiding inheritance tax. The mechanism itself requires that these companies have substantial assets financed by equity.

Generally, all the equity is distributable in accordance with the suppletive rule, although the articles of association could provide otherwise. However, banks sometimes request that part of the equity be declared non-distributable, thereby recreating a form of capital in its creditor protection function (imperfect though it may be).

57 *Graydon* (fn. 55), p. 20.

58 *Christoph Van der Elst*, "De invloed van het nieuwe WVV op het vermogen, de aandelenstructuur en de aandelenoverdracht van en bij nieuwe BV's: een empirisch onderzoek", Revue pratique des sociétés – Tijdschrift voor Rechtspersoon en Vennootschap 2020, 355.

4.4. Contributions in Services Are Not Used

Contributions in services are not very successful, to say the least. Sources describe their tax regime as a "catastrophe" or at least as uncertain[59] and dangerous. From an accounting point of view, these contributions cannot be used to constitute equity.

Still, many shareholders of limited liability companies work actively for their company. They are remunerated in cash under a service agreement or a management contract, or sometimes under an employment contract if the conditions are met. If they wish to receive a consideration under company law, techniques are available to avoid the classification as a contribution: for example, they can subscribe (for a small amount of cash) to shares which entitle them to a share of the profits calculated according to the quantity, quality or results of the services they have provided. Stock options are also used whereby employees can receive, in exchange for their services, the right to subscribe, without preferential rights, to shares issued by the company in return for a small contribution (art. 5:130 and 5:131 CCA).

The amount of the contribution to be made in order to receive a share is now purely conventional (Art. 5:121 CCA), and the concept of 'personnel', which makes it easier to derogate from the preferential right of shareholders in case of additional contributions, has been extended to natural and legal persons who are committed to the company "under a management or similar contract" (Art. 1:27 CCA). This extends to directors and managers the benefit of special provisions facilitating the acquisition of company shares by employees.

4.5. Most Articles of Association of Private LLC Stick to the "Default" Rules

Most of the rules in the Code of Companies and Associations are suppletive, and the new Code contains more suppletive rules than the previous Companies Code. The goal was to enact rules that are preferred by the largest number of entrepreneurs, while allowing them to deviate from them when they consider it more appropriate for their company.

This technique seems to work well. Most companies that are incorporated, or recast their articles of association, under the Code of Companies and Associations, actually stick to the suppletive rules without substantially altering them.

However, some of them add optional provisions, usually following a suggestion by a notary, accountant or other advisor: unpaid equity, pre-emption

59 *Garabedian/Thonet* (fn. 8), p. 328.

clauses, share classes, and, most importantly for our purposes, the possibility of exclusion and resignation.

They are rare, but they do exist: some people intend to take full advantage of the wind of freedom that has blown over company law. Ideas blossom for achieving a series of objectives that are *a priori* foreign to company law and relatively unorthodox when compared to the principles of company law. Tax or estate planning, and sometimes the desire to take advantage of the naivety of a less experienced or less cautious partner are all reasons for adopting articles of association that are off the beaten track. One can think of share allocations that are not proportional to the contributions, multiple and highly asymmetrical voting rights, and other techniques permitted by the suppletive nature of the rules.

In most cases this is not formally prohibited by company law. It is therefore permitted, one might conclude without further ado. However, it is not certain that this is the view of other branches of law. How will these mechanisms be analysed in the context of property law, for example (reservation of inheritance, reclassification as a disguised donation)? How will the tax authorities consider these choices set out in the articles of association, if they make it possible to reduce the tax burden or to evade tax?

All this is not completely new, and some sectors in particular were already using similar mechanisms before the Code of Companies and Associations, but then usually within the framework of an public limited company. As before, shareholders' agreements also remain a preferred instrument for organising such arrangements.

4.6. The Liquidity Test Is Applied as a Merely Formal Requirement

The suppression of capital has been counterbalanced by the introduction of an additional condition for distributions: the liquidity test. It is therefore no longer sufficient to look at the equity in the balance sheet, but it must be demonstrated that, based on reasonably expected developments, the company will be able to meet its outstanding debts within twelve months of the distribution.

In most companies, this condition is not problematic. It is in the interest of the shareholders and the directors to comply with it, as they want to avoid liquidity problems in the company.

Nevertheless, in practice, the liquidity test is often carried out in a particularly lenient manner. The accountant prepares a report limited to the application of the so-called 'quick ratio' that ensures that current assets are higher than current liabilities (including the dividend payment). This may be an indication of liquidity but is certainly not the ultimate proof of it.[60] The ratio is applied based on the balance sheet figures, which are usually 6 months old at the time the test is performed, and therefore significantly outdated. No further thought is given to, and nothing is written about, the liquidity situation of the company at the time of the distribution. The director usually signs the report with neither a proper understanding of its signification nor the awareness of the associated liability risks.

If by any chance the amount to be distributed exceeds the amount allowed by the liquidity test, a part of the amount is recorded as a long-term debt (with a maturity of more than one year), so that this part of the amount "falls outside" the liquidity test.

On this point, the objective of the new rules does not seem to be fully understood, nor properly abided to, by the economic actors.

4.7. Tax Law Is an Obstacle to Creativity

Tax law has been formally adapted to the new Companies and Associations Code.[61] However, its foundations remains based on the previous system: the capital system is basically retained in tax law. Thus, for example, a tax concept of 'capital' has been recreated, which is quite similar to the old company law capital and to the capital of the public limited company. Thus, private LLCs no longer have a capital under company law, but they still have a capital under tax law, with the tax effects attached to it.

As already mentioned, the contribution in services which is now authorised in the private LLC is not recognised as constituting equity in accounting and tax law. The countervalue of contributions in services is not considered as capital for tax purposes.[62]

In addition, the use of some mechanisms is made uncertain or even dangerous due to tax uncertainty. For example, the treatment of contributions in services from the point of view of personal income tax (for the contributor), corporate income tax (for the company receiving it), VAT and social security contributions is not sufficiently clearly regulated. Some may see it as an opportunity, hoping to slip through the cracks of a net that is not designed to catch this type

60 *Bruloot/Nelissen Grade* (fn. 2), p. 62.

61 Law of 17 March 2019 adapting certain federal tax provisions to the new Code of Companies and Associations.

62 Art. 2, § 1er, 6° of the CIR 92, as amended by the law of 17 March 2019 adapting certain federal tax provisions to the new Companies and Associations Code. On the tax consequences of this rule, see *Thonet*, Les conséquences fiscales (fn. 8), p. 13–14.

of income. Others are chilled by the uncertainty and finally opt for the use of old techniques, whose tax and parafiscal treatment is better known.

These elements limit the attractiveness of the new features of the Code of Companies and Associations and explain why some of them are not used intensively.

5. Conclusion

This article first of all aimed to identify the exact scope of the reform of the limited liability company decided in Belgium in 2019. The total abolition of the notion of capital in this type of company may seem revolutionary at first sight, but in reality it is less so than it seems. Creditor protection is still ensured and even strengthened by the double test applicable in case of distribution. Several rules previously associated with capital still exist in the new system, in a slightly adapted form.

The practice of the few years that have elapsed since the entry into force of the new Code does not offer sufficient hindsight to draw definitive conclusions, especially as extraordinary events have disrupted the functioning of the economy. Nevertheless, the reform can already be considered as a success. Several of its objectives are gradually being achieved. The private limited is becoming the basic company form and is chosen by the vast majority of those setting up a company. The initial equity is lower than before, but this does not seem to lead to more insolvency situations. Many founders stick to the suppletive rules of the Code, which means that these rules are suitable for the most common situations. However, despite the educational efforts already made in this respect, many people, including legal and accounting professionals, have not yet fully assimilated the new rules and all their consequences. This leads, for example, to an insufficiently cautious application of the liquidity test. Finally, time is still needed to better adapt tax law to the new limited company without a capital.