UCLouvain

Faculté de droit et de criminologie

The Private Limited without Capital: How is it faring?

Henri Culot

Prof. UCLouvain and USL-B

Avocat Prioux Culot + Partners

PRIOUX CULOT + PARTNERS

ATTORNEYS - AVOCATS - ADVOCATEN

CRIDES

Centre de recherche interdisciplinaire Droit, Entreprise et Société

UCLouvain

Faculté de droit et de criminologie

Contents

1. What is new in the private LLC?

- suppression of capital
- no minimum capital
- no (fixed) minimum of paid-up equity
- contributions in services are allowed
- equity can be fully distributed
- but a double test must be carried out before distribution of dividends: solvency test and liquidity test
- resignation and exclusion of a shareholder

2. What is not new?

- sufficient equity
- control of contributions in kind by an auditor
- shares buy-back, financial assistance
- alarm bell

UCLouvain

Faculté de droit et de criminologie

3. Three years of practice: some observations

1. Effects of the new regime are difficult to isolate

- new Code entered into force in May 2019 and applied to existing companies as of January 2020
- Covid pandemic 2020-2021: economic shock, moratorium on bankruptcy, public subsidies, …
- Ukraine and energy crisis 2022

2. Most new companies are private LLC

- newly formed companies in 2021 :
  926 public LLC, 39330 private LLC
- but private LLC only represented 33% of new enterprises
- while 56% of new enterprises were natural persons

3. Initial equity is usually lower than the former minimum capital

- no minimum capital / contribution
- many founders chose a rather symbolic, rounded figure (€ 1000 or € 5000)
- except for patrimonial companies

4. Contributions in services are not used

- contributions in services are allowed
- they can be retributed with shares but they do not form part of the equity on the balance sheet
- fiscal nightmare
- alternative ways to remunerate services with dividends (as before)

5. Most statutes stick to the default rules

- new options remain widely unknown
- when presented by a professional, some variations can be popular
  - unpaid equity
  - pre-emption clauses
  - share classes
  - exclusion and resignation
- but there are sorcerer's apprentices who believe that anything is allowed: tax motives, estate planning, …
  - risk of dispute
  - tax risks (simulation, abuse, …)
  - risks under other types of rules (donation, inheritance, …)

UCLouvain

Faculté de droit et de criminologie

6. The liquidity test is applied as a merely formal requirement

- many directors do not know / understand
- accountants simply apply the « quick ratio »:

$$\frac{current\ assets}{current\ liabilities + dividend} \geq 1$$

- based on the last (outdated) balance sheet
- any surplus is recorded as long-term debt

7. Tax law is an obstacle to creativity

- tax law has been formally adapted to the new Code
- but its foundations remain based on the previous system (ie with capital)
- some options available under company law trigger a heavier taxation or tax uncertainty

UCLouvain

Faculté de droit et de criminologie

Conclusion

- private LLC without capital is a success
- educational efforts are still needed
- tax law should be fixed

UCLouvain

Faculté de droit et de criminologie

Thank you

PRIOUX CULOT + PARTNERS

ATTORNEYS - AVOCATS - ADVOCATEN

CRIDES

Centre de recherche interdisciplinaire Droit, Entreprise et Société