contrast

NEW CODE OF COMPANIES AND ASSOCIATIONS

IN A NUTSHELL

#4
To distribute or not to distribute?

Distributions to shareholders of limited liability companies are subject to specific rules intended to ensure creditor protection. Such rules apply not only with respect to direct distributions of profits, such as dividend payments, but also to equivalent transactions, such as the acquisition by a company of its own shares and financial assistance given by a company for the purchase of its shares.

The common denominator of these rules under our current company laws is that the corporate capital serves as a buffer in the interest of creditors. In principle, no distribution may therefore take place to the extent that a company's net assets drop below the amount of its corporate capital (plus reserves that are not distributable by virtue of the law or the articles of association).

By contrast ...

The concept of corporate capital has been abolished for the new BV/SRL and the CV/SC. Distributions by these companies will thus be subject to a new set of restrictions that are entirely detached from this concept. This is not the case for the NV/SA, as the Belgian legislator remains bound by capital requirements imposed by European company law directives with respect to this company form.

In general, the rules governing distributions (and equivalent transactions) are simplified, clarified, and in certain aspects also made more flexible for all limited liability companies.

Let us have a closer look.

- **New two-fold distribution test in the BV/SRL and CV/SC**. Whereas distributions in the NV/SA remain subject to the existing net asset test, an entirely new (double) test will apply for distributions in the BV/SRL and the CV/SC, as a result of the abolishment of the capital requirements in these company forms. On the one hand, the distribution may not cause the company's equity to become negative (or affect unavailable reserves). On the other hand, the distribution may not compromise the company's ability to pay its debts over a period of 12 months following the distribution. This two-fold test applies to all distributions, in whichever form, including any reimbursement of shareholder contributions or any payments in the context of a shareholder's withdrawal or exclusion. In companies that have appointed a statutory auditor, the statutory auditor will be required to review the financial information on which the distribution is based.

- **"Alarm bell" procedure adjusted accordingly in the BV/SRL and CV/SC**. The classic "alarm bell", requiring a company's board of directors to convene an extraordinary general shareholders meeting when the company's net assets have fallen below a minimum threshold, has been adjusted accordingly in the BV/SRL and CV/SC. In these companies, the board of directors shall be obliged to convene an extraordinary general meeting which must meet within two months after the board of directors has (or should have) established that (i) the net assets have become (or are likely to become) negative or reduced below the level of any un-distributable reserves or (ii) it is no longer certain, taking into account reasonably foreseeable evolutions, that the company will be able to pay its debts over a period of 12 months. For the NV/SA, the "alarm bell" has not changed and therefore remains as currently set out in article 633 of the Belgian Company Code.

- **Flexibilization of interim dividends**. The current regime in the NV/SA with respect to interim dividends is made more flexible and is now extended also to the BV/SRL and CV/SC. In terms of timing constraints, the prohibition to distribute interim dividends during the first six months of the financial year, as well as the minimum waiting period of 3 months between two distributions, is cancelled. Furthermore, an interim dividend can be based not only on the profits of the current financial year, but now also on the profits of the previous financial year (provided that the annual accounts for that financial year have not yet been approved by the shareholders).

- **Recoverability of unlawful dividend distributions**. Shareholders who have received dividends issued in violation of the aforementioned distribution rules may be obliged in some circumstances to reimburse such distributions. In the BV/SRL and CV/SC, unlawfully received dividends must be reimbursed regardless of whether the shareholders received them in good faith or not. Unlawful distributions will also constitute a specific ground for director liability.

- **No maximum percentages in respect of acquisition of own securities and cross-participations**. The current maximum of 20% for the acquisition of own shares (and (profit) certificates) is abolished, so that the NV/SA and BV/SRL

can now acquire their own securities without additional financial limitations (other than the distribution tests described above). Most other current existing legal requirements remain applicable, such as the required shareholders' approval by special majority (albeit at a majority of 75% only, instead of 80% currently). In addition, the limitation of 10% on cross-participations (participations by subsidiaries in their parent company) is also lifted.

- **Simplification and depenalization of the rules on financial assistance**. The provision of financial assistance by a company for the purchase of its shares (or certificates) remains subject to specific rules, which have, however, been simplified in the new Code. Also the publication requirements in respect of such transactions have been relaxed for the BV/SRL and CV/SC. The most important restriction remains that any such transaction can only be funded with amounts that are available for distribution. In line with the new Code's overall objective to reduce the number of criminal sanctions, a breach of the requirements relating to financial assistance will henceforth no longer be punishable by criminal sanctions.

- **No material changes to rules governing capital reductions in the NV/SA**. The new Code introduces some technical (non-material) changes as regards the procedure for capital reductions in the NV/SA. The legal requirements existing today remain applicable, such as the mandatory 2-month waiting period during which creditors of the company may request additional security.

Limitations on distributions constitute an essential aspect of the protection of creditors and the preservation of company's assets. In the new Code, director's accountability will also have an important role in the protection of creditors, with a greater emphasis on the continuous obligation to monitor and justify the company's going concern and continuity. This topic will be discussed in one of our next 'In a Nutshell' newsletters.

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