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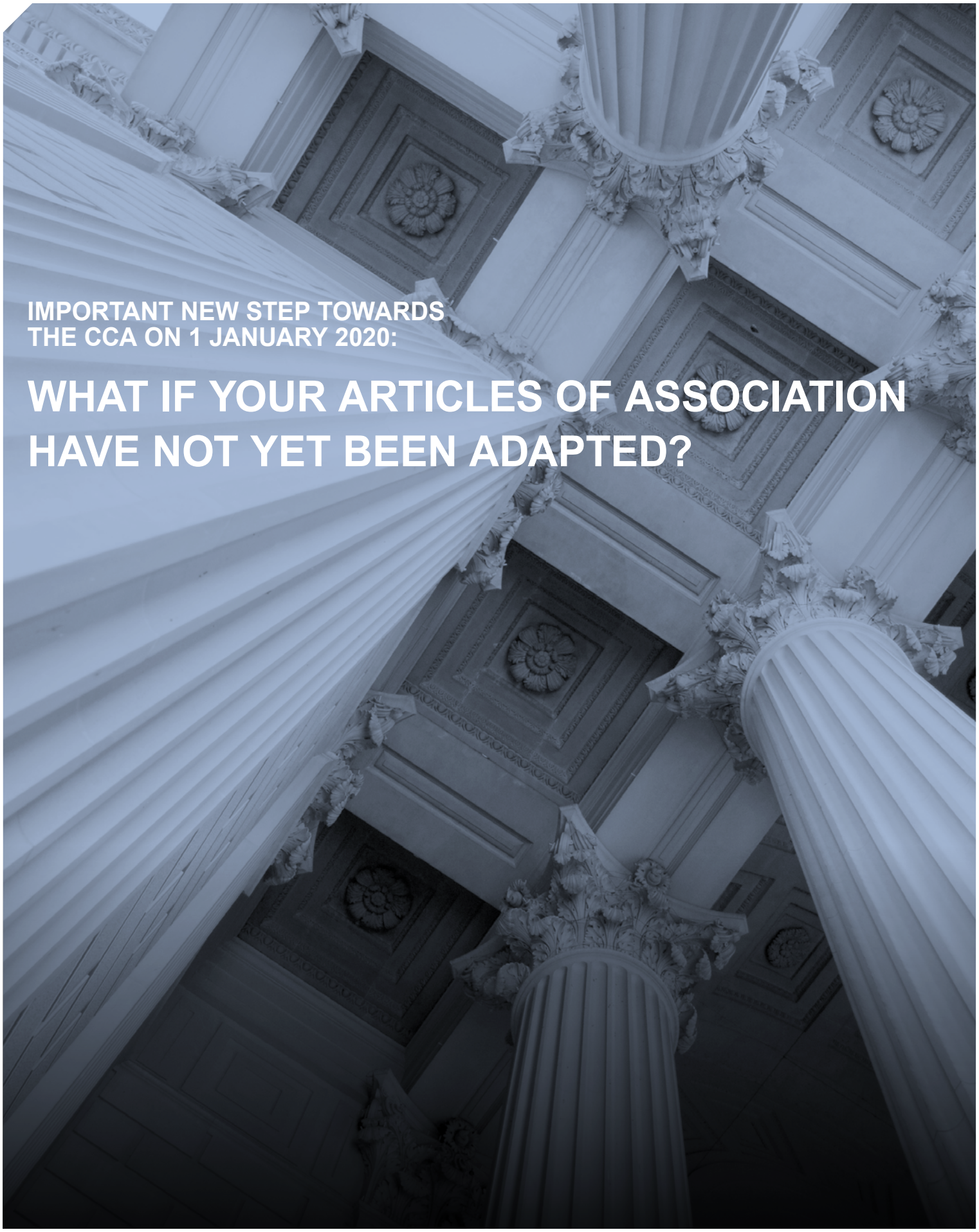
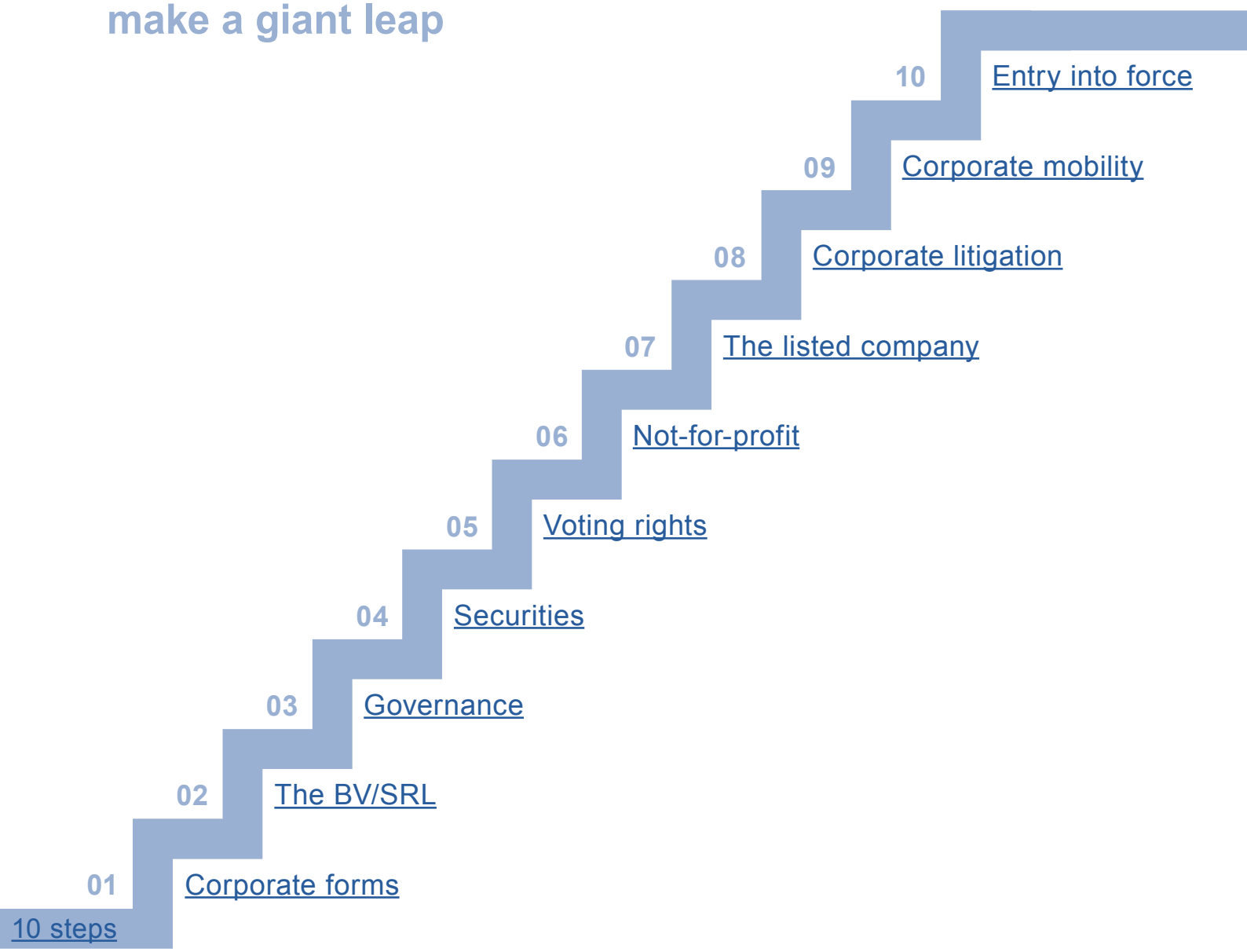


IMPORTANT NEW STEP TOWARDS THE CCA ON 1 JANUARY 2020:

WHAT IF YOUR ARTICLES OF ASSOCIATION HAVE NOT YET BEEN ADAPTED?

10 STEPS

make a giant leap



WHAT IF YOUR ARTICLES OF ASSOCIATION HAVE NOT YET BEEN ADAPTED?

The act of 23 March 2019 introduced the Code of Companies and Associations ("CCA"). The CCA already applies to companies, associations and foundations established on or after 1 May 2019. You already joined us on the countdown to that date here. Now we are facing another crucial step. As of 1 January 2020, the CCA will also – automatically and, in principle, fully – apply to companies, associations and foundations that were established before 1 May 2019 and that have not already chosen an early opt-in. These existing companies, associations and foundations do not have to align their articles of association with the CCA immediately, but will be granted a respite until 1 January 2024 at the latest. But make no mistake: as of 1 January 2020, you will have to deal with the new CCA in any case, both with regard to your articles of association and with regard to the mandatory statements on your invoices and documents.

Beware of statutory provisions that conflict with new mandatory rules of the CCA

Introduction

As long as the articles of association have not been adapted to the CCA, caution is advised when consulting the articles of association. **Existing provisions in the articles of association will be held to be non-existent as from 1 January 2020 if they would conflict with the new mandatory rules of the CCA.**

This danger is not inconceivable. Although the CCA is generally characterised by far-reaching flexibilisation (more supplementary law), it does contain a number of mandatory provisions that are stricter than or deviate from the previously applicable statutory provisions. Moreover, in practice the latter were often repeated in the articles of association with a view to making them more user-friendly.

As of 1 January 2020, the mandatory provisions of the CCA will apply to all companies, associations and foundations.

Below we discuss a number of important issues in respect of governance, the general shareholder meeting, securities and (maintenance of) the equity/capital.

Governance

The new ***cap on the liability*** of directors of legal entities has already been the subject of much debate. As of 1 January 2020, this legal limitation will also apply to directors of existing companies, associations and foundations – at least for actions or omissions causing damage that take place on 1 January 2020 at the earliest. The other side of the coin, however, is that ***members of a collegiate governance body will, in principle, always be jointly and severally liable***, including for ordinary managerial errors and not only for violations of the CCA or the articles of association. In addition, ***legal entities may no longer indemnify or exonerate their directors in advance*** for their liability.

In the event of a ***conflict of interest*** , the director concerned must report this to his fellow directors and then ***abstain from participating in the deliberations and the vote*** on the agenda item concerned. This conflict of interest procedure will also apply to associations and foundations. If all directors (or, in associations and foundations, the majority of the directors) have a conflict of interest, the decision must be submitted to the general meeting. A specific conflict of interest procedure has also been introduced for the event of a capital increase with cancellation of preferential subscription rights within the framework of the authorised capital: directors who are considered to be the *de facto* representative of the beneficiary are not allowed to vote. (This is in line with the prohibition against a shareholder who holds at least 10% of the voting rights participating in the vote on a capital increase with cancellation of preferential subscription rights in his/her favour.) You therefore need to be alert to any more lenient conflict of interest rules in the articles of association: the rules of the new regime will take precedence.

Stricter rules will apply in case of conflicts of interest.

The **scope of the *daily management* is extended as a result of the new legal definition**. It includes acts and decisions that do not go beyond the needs of the daily life of the legal entity and acts and decisions that do not justify the intervention of the governance body, either because they are of minor importance or because they are of an urgent nature. As a result, daily managers who are already in office will, in principle, automatically have broader powers as from 1 January 2020. In addition, it will also be possible to appoint a daily manager in a BV/SRL.

Moreover, the rules on the **permanent representation** of legal entity-directors in companies will be made more stringent: the permanent representative is required to be a natural person who does not already have a seat on the governance body in another capacity (*e.g.* as a director in his own name or as a permanent representative of another legal entity-director). From now on, the rules will also apply to **associations with legal personality** and to **foundations**. If the **daily management** has been entrusted to a legal entity, that legal entity will also have to appoint a permanent representative in this capacity as of 1 January 2020. In practice, therefore, a large number of legal entity-directors will have to appoint a (new) permanent representative by 1 January 2020 at the latest.

The permanent representative can act on behalf of only one legal entity-director.

From now on, **internal regulations** will be required to have an express basis in the articles of association and may no longer contain provisions affecting the rights of partners, shareholders or members, the powers of the bodies or the organisation or the operation of the general meeting. The fate of existing internal regulations after 1 January 2020 therefore deserves your attention, even if you do not immediately adapt your articles of association to the new Code.

General shareholder meeting

The governance bodies of the NV/SA, BV/SRL and CV/SC are ***obliged to convene* a general shareholder meeting** if shareholders representing one-tenth of the capital (for an NV/SA) or one-tenth of the number of shares (for a BV/SRL or a CV/SC) so request. For non-profit organisations, the threshold for compulsory convocation remains one-fifth of the members, but the **notice period** for the general meeting is extended from eight to fifteen days.

For the NV/SA, the CCA amends the ***rounding rule*** for shares with an uneven capital representation value. Instead of neglecting the fractions per share, the rounding is now done per shareholder, and hence on his entire shareholding.

In the extraordinary general shareholder meeting (for amendment of the articles of association), ***abstentions no longer count as an implicit vote against*** the resolution, but are not included in either the numerator or the denominator, as was already the rule for the ordinary general meeting.

If a ***usufruct on securities*** has been established, the usufructuary will be entitled to exercise the rights, unless otherwise stipulated in the articles of association, in a will or in an agreement.

In a number of cases, the application of these rules may lead to an (unwanted) power shift in the general shareholder meeting as of 1 January 2020.

Securities

The ***scope of what has to be recorded in the securities register*** is extended. From now on, the securities register will also have to mention any transfer restrictions (laid down in the articles of association, or, to the extent known, in agreements), the voting and profit rights attached to the security and the share in the liquidation surplus.

In the event of a ***transfer of shares that have not been paid up in full***, in the NV/SA, BV/SRL and CV/SC the transferee and transferor are jointly and severally liable towards the company to pay up the shares in full.

Securities registers must contain more information.

Equity/capital

Under the CCA, ***each issue of new shares*** requires a ***report from the governance body*** that justifies the issue price and describes the consequences for the capital and membership rights of the existing shares. This reporting obligation therefore no longer only applies to a contribution in kind.

The capital of existing BVBAs/SPRLs and "true" CVBAs/SCRLs (as from 1 January 2020 called BV/SRL and CV/SC respectively – see below) will automatically be converted into a ***statutory non-distributable reserve*** as from 1 January 2020. For each ***distribution*** in these companies, two distribution tests will have to be satisfied: a ***net asset*** test and a ***liquidity test***. The governance body must ascertain that the net assets are not lower than this converted capital, or will not drop lower as a result of the distribution. In addition, the governance body must also establish that, taking into account reasonably foreseeable developments, the company will continue to be able to pay its debts after the distribution as they become due and payable over a period of at least 12 months from the date of the distribution.

> Distributions in a BV/SRL or CV/SC are subject to a net asset test and a liquidity test.

In parallel with these distribution tests, ***the alarm bell procedure*** for these legal forms has also been reformed. The governance body will have to apply the alarm bell procedure when the net assets have become or are likely to become negative, or when the governance body determines that, taking into account reasonably foreseeable developments, the company will no longer be able to pay its debts as they fall due in at least the next 12 months.

Articles of association that have not been updated may hinder the use of the new flexibility

In the foregoing cases, as of 1 January 2020, you must apply the new Code and set aside your articles of association where they contain the old, less strict rules. However, the opposite is not true: **if your articles of association contain the old rule on a point where the new Code is more flexible, your old articles of association will take precedence**

To the extent that certain simplifications or new possibilities provided for in the CCA result from purely supplementary (*i.e.* non-mandatory) provisions of the CCA, they may in fact be obstructed by stricter provisions in the articles of association. This requires a case-by-case analysis of the articles of association.

An example is written decision-making in the governance body. The only requirement set by the CCA for making use of this possibility is unanimity of the directors. However, if the existing articles of association still paraphrase the old rule in the Companies Code, written decision-making will still only be possible after 1 January 2020 in exceptional, urgent circumstances that must be justified in the light of the company's interests.

Another example concerns the purchase of own shares, for which the CCA offers new possibilities.

Mandatory statements on invoices and other documents

As of 1 January 2020, the new names for the various legal forms as laid down in article 1:5 of the CCA will apply. From that date, existing **BVBAs/SPRLs** must therefore mention that they are **BVs/SRLs** in all deeds, invoices, announcements, disclosures, letters, orders, websites and other documents emanating from the company.

For **CVBAs/SCRLs**, the situation is more complex. If the CVBA/SCRL meets the new definition of article 6:1 of the CCA, it will have to participate in the legal order as a **CV/SC** as of 1 January 2020 and will have to mention this on all its invoices and other documents as well. In addition, the law in relation to CVs/SCs provided for by the CCA will apply to these companies. If, on the other hand, the CVBA/SCRL does not satisfy this definition, it will remain a CVBA/SCRL until it is (automatically or otherwise) converted into a **BV/SRL**. In that case, these companies remain subject (until 1 January 2024 at the latest) to the provisions of the old Companies Code with regard to the CVBA/SCRL, while at the same time the provisions of the CCA with regard to the BV/SRL (except for the provisions on equity and on withdrawal and exclusion) also apply to them. **The governance body of the CVBA/SCRL must therefore decide for itself, by 1 January 2020, whether or not the CVBA/SCRL satisfies the definition.**

> Only a "true" cooperative CVBA/SCRL will become a CV/SC.

From 1 January 2020, every BVBA/SPRL becomes a BV/SRL.

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