THE IMPACT OF THE NEW COMPANY AND ASSOCIATIONS CODE ON INTERNATIONAL NOT-FOR-PROFIT ASSOCIATIONS

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1. Introduction

FAIB is the Federation of European and International Associations based in Belgium that counts among its membership some 300 full member associations - representing industry sectors, NGOs , finance, cultural, scientific, philanthropic organisations, as well as other international not-for-profit associations - AISBL / iVZW- ("**INPAs**") with a European and international scope of activities. Today according to the UIA's[1] latest figures, there are some 2,800 such associations based in Belgium.

FAIB was originally set up in 1949 at a time when Belgium was beginning to become a hub for international associations attracted here both by the development of inter-European relationships and the legal framework resulting from the Belgian legislation on INPAs (law of 25 October 1919) : indeed this legislation, with the high degree of flexibility it provided for the management of associations with an international membership and activities throughout the world, soon proved to be a pole of attraction for international associations.

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[1]. The Union of International Associations (UIA) set up in 1907 is a research institute and documentation centre, based in Brussels which produces the Yearbook of International organizations from which the figures for Belgium are drawn.

The attraction of Belgium was also enhanced by two further elements : with the growth of Brussels as the prime centre for the EU institutions, the association, foundation and NGO sectors have grown considerably, with nowadays, according to our recent survey, 71 % of associations establishing themselves in Belgium to interface more easily with the European institutions. This number will no doubt increase with Brexit.

Another advantage lies in the Royal sanction of the INPA (AISBL / iVZW), which 80 % of international associations included in our survey have chosen to adopt, despite the specific and increasing constraints associated with its legal form.

The presence of INPAs has generated many high paying jobs to Belgium in addition to increasing the tax base and increasing the need for services like construction, hotel and restaurant and professional services : in Brussels alone in 2019, there were some 4,000,000[2] overnight stays categorised for business including association activity.

As regards the impact on employment, many different organisations have provided a range of estimates for advocacy representatives who represent a large proportion of INPAs based in Belgium, mostly in Brussels.

For example, Transparency International in September 2016 : stated “a conservative estimate for the number of Brussels lobbyists is 25,000” (with a budget of some 1.5 billion euro). “With a further 10-15,000 lobbyists across Europe that occasionally influence decisions in Brussels as well.” And the Corporate Europe Observatory estimated the number of lobbyists to be about 30,000. The European Parliament in its 2018 report stated that more than 82.000 lobbyists were registered.

As a result, in 2019 Belgium’s success in attracting associations to Belgium, led it to becoming the first hub in the world for such activities.

Nevertheless, in recent years, despite the enlargement of the EU and the widening of the scope of EU regulation and financing, we see that the rate of growth of the number of INPAs has slowed down considerably. Instead, we see a clear increase in the number of temporary alliances, managed by a limited number of staff in professional consultancies replacing the more traditional route of the creation of permanent INPAs.

The revised law on INPAs in 2002 already eroded much of the flexibility found in the 1919 law, with, for example, the requirement for more complex accounting procedures for larger INPAs and, above all, a more regular necessary recourse to notaries public, which, for associations that hold their annual meetings worldwide, has generated considerable complexity and administrative burden.

Given that the tendency to work by digital means is becoming ever more prevalent, and this will no doubt be reinforced by COVID-19, it was essential that Belgium should act to

[2] Visit.Brussels Annual report: https://visit.brussels/site/binaries/content/assets/pdf/barometres/rapport-annuel-2019-en.pdf

reinforce the competitive edge it has gained through having the major EU institutions, as well as NATO located in Brussels.

As Belgium is unable to compete with countries like the Netherlands and Germany where fiscal policy or cost of labour are concerned, an attractive regulatory framework, complemented by simple administrative requirements, will play a key role. With the advent of Brexit, for example, Belgium has attracted many associations and NGOs to Brussels, but there is strong competition from neighbouring countries. This power of attraction to Belgium is essential because, unlike international companies which often have a high degree of mobility, moving from country to country, the relocation of international associations is rare.

When discussions on the present Belgian Companies and Association Code (the "**CAC**"), in which FAIB participated, began, the distinction between INPAs and not-for-profit associations ("**NPAs**") and even companies had largely eroded, with scarcely a page of the texts being allocated to INPAs. The text, which was finally adopted after well over a year of discussions between FAIB, its experts and regulators, has seen much of the specificities of the INPA's statute enshrined in the new law. Nevertheless, new requirements have been introduced to align its status more closely with that of companies. There are, however, new elements that will contribute to the ease of relocating INPAs to Belgium.

This article sets out to highlight the issues that the new CAC has engendered and, although the law has only recently entered into force, to comment on its practical impact on INPAs, including as regards implementation.

2. Adapting INPA statutes to the new CAC

Before the adoption and entry into force of the CAC, many INPAs and NPAs in general were sceptical about the reform. Some stakeholders even took initiatives to prevent associations from being included in the reform. In particular, the fact that associations would now be allowed to carry out all types of economic activities as main activities was perceived as disrupting the very essence and role of an INPA, namely, that of having a disinterested international purpose which could be achieved by activities other than economic profit-making activities. In the general trend whereby associations and foundations are considered to be "enterprises", it was also feared that the reform would mainly align provisions applicable to associations to those for companies without taking into consideration the specificities and particularities of associations including INPAs. This could be attributed to the fact that the not-for-profit sector was, at least for a while, not sufficiently involved in the genesis of the reform.

Despite their initial reluctance, once the CAC was adopted, it was generally positively received by INPAs. This is because the reform did not include in-depth or substantial changes for INPAs, except for the possibility of carrying out mainly economic activities, the national and international transformation possibilities, the new Directors' liability regime and the provisions governing internal rules.

Before the entry into force and the application of the CAC, many INPAs informed themselves about the upcoming changes by attending events and seminars. They were curious to find out what impact the new CAC would have on their governing rules, activities, Directors' liability, the organisation of meetings and the decision-making process of their governance bodies. That said, during the opt-in period, INPAs seemed not overly concerned with changing their statutes yet. Thus, most did not initially go beyond the information stage. A limited number of FAIB's members decided to make use of the opt-in by changing their statutes in 2019. This often involved INPAs which were facing a restructuring process and were therefore interested in using the new possibilities offered by Books 13 or 14 of the CAC in terms of restructuring or transformation.

Since 1 January 2020, the number of INPAs that have decided to amend their statutes has, however, increased. It is worth mentioning that most of the INPAs that are changing their statutes already scheduled an amendment of their statutes. However, INPAs that were recently incorporated or that changed their statutes a short while ago before the CAC had entered into force have decided, in general, to postpone aligning their statutes to the CAC to a later date. They do not see the immediate need for action in this respect in 2020 or 2021.

At least one out of two INPAs aiming at changing its statutes is taking a minimalist approach: conflicting provisions are removed from the current statutes and only mandatory rules under the CAC, for example, relating mainly to the powers of the general assembly, the functioning of the management body, directors' liability in addition to the deliberation, nullity and suspension of the decisions of the governance bodies or to dissolution and liquidation are, as far as necessary, included in the revised statutes. In addition, in the light of the new Article 2:59 CAC, provisions that were recently included in the INPA's internal rules must be transferred to and included in the statutes (see point 7 hereinafter).

Those INPAs preferring to go beyond a minimalist approach use the flexibility that the CAC offers with respect to membership structure, electronic communication, the daily management bodies, the conflict of interest rules, and so on. They are also mostly sensitive to the improvement of their governance models and rules, while INPAs taking a minimalist approach in general do not care about or do not search for a better governance structure within their association. The main changes which have a practical impact relate to the INPA's organisation and voting methods of the governance bodies, the use of electronic means and new information technologies in their decision-making process or other items for which they do not find guidance in the CAC (see point 7 hereinafter).

3. Enhancing the international nature of INPAs and cross-border mobility

3.1. Rules on the nationality of companies and not-for-profit organisations:

Belgium decided to switch from the real seat theory to the statutory seat theory, thereby following the lead of most other European countries. According to the statutory seat theory, the legal entity is subject to the law of the country where it has been incorporated. According to the real seat theory, the applicable law is the law of the country where the legal entity has its real seat, in other words, its head office. Although the new regime is not solely related to INPAs but rather to all types of companies and not-for-profit organisations,

the new rules on nationality of legal persons benefit INPAs, in particular given their international nature. For some, the principal place of management does not coincide with their registered office and is located abroad. It should be stressed that the criterion of "principal place of management" might be less appropriate for INPAs than for other legal forms : indeed in some cases, it may be difficult to identify the country from which the association is effectively managed.

Federations structured as INPAs often combine their annual general assembly and board meeting with a congress to be held each year in another country. Furthermore, virtual meetings might be held (teleconference), rather than physical meetings to save on travel costs. Some of these federations might even have a rotating secretariat with management of the association moving from one member to another over time, in some cases sometimes regularly.

Is the real seat theory (principal place of management), and its requirement of being physically managed from one geographic point, supposed to be immutable, or is it becoming obsolete in an increasingly digitalised world ? With the measures taken in the context of the COVID-19 (widespread use of teleworking), this question has become even more relevant.

Moreover, in a certain way, there is a contradiction between the concept of "international association" and the fact that such a legal form would be exclusively submitted to the jurisdiction of one country. As far as companies are concerned, it should be stressed that alternatives were created, such as the "Societas Europea". Unfortunately, no equivalent exists for the not-for-profit sector since the proposals to create a "European Association" and a "European Foundation" were abandoned.

It was of course not possible to address this issue in the context of a modification of domestic legislation, but the switch of Belgian law from real seat theory to statutory seat theory is at least a step in the right direction.

Under the new regime, an INPA which would be managed exclusively from abroad, is no longer exposed to a risk to see its Belgian nationality and its recognition of "international association" questioned. The same is true for other types of not-for-profit organisations established in Belgium.

It is very difficult to have an idea of the number of Belgian associations concerned, but it is clear that the new CAC has put an end to a source of legal insecurity in this area and is contributing to making Belgium more attractive as a place in which to locate an international association.

3.2. Rules enhancing the access to the legal form of INPA in a national and transnational context

Before the CAC entered into force, the only way to adopt the legal form of INPA consisted in creating a new legal entity. It was not possible to acquire the status of INPA through the conversion of an existing legal entity into this specific form.

Now, at national level, the CAC opens the possibility - under certain conditions - to convert any form of company into an INPA and to convert a not-for-profit association into an INPA. This latter possibility can be used by existing NPAs considering extending their activities and operating internationally and/or to highlight their international dimension through a label (Royal Decree). Given that the CAC will only be fully applicable to existing entities in 2024, It will be necessary to wait longer than one year after entry into force of the CAC to see to what extent this last possibility has already been used. In any case, it is clear that the new rules represent a significant improvement compared with the old legislation according to which a transition from an NPA to an INPA required a long and cumbersome process, including the creation of a new entity and the liquidation of the existing NPA.

Internationally, because of advocacy efforts by the INPA sector, the possibility of operating transnational conversions, which were initially only intended for companies, was extended to not-for-profit organisations. The concept of transnational conversion supposes two elements :

- The registered office of a legal entity is being moved to another state;

- The relocation of the registered office can also coincide with the conversion of the company into a legal form provided by the legislation of the host state.

The transnational conversion can take place from Belgium to a foreign country or vice versa, in other words emigration and immigration :

- Outbound conversions : associations, as well as foundations, under Belgian law can move their registered office to a foreign country and convert it into a legal form provided by the legislation of that country;

- Inbound conversions : based on the wording of the law, any foreign legal entity (including a company) can be converted into an NPA, an INPA or a foundation.

The advantage of these operations is that the whole process takes place under the regime of continuity of the legal personality (without winding up the existing foreign company). As a consequence, the entity keeps its identity, its assets, its contracts and liabilities and, for many what is most important, its access to subsidies. This last point appeared to be a solution for UK charities funded by the EU and looking into relocating in Belgium in the context of Brexit.

3.3. What has happened in practice on this issue to date?

Transnational conversions have been successfully operated by companies and by not-for-profit organisations moving to Belgium from, amongst other countries, Germany or the Netherlands, even before the entry into force of the Belgian CAC. Some of the entities in question were converted into an INPA according to Belgian law.

To achieve this operation in the host country and to deliver a certificate that the foreign requirements have been met, it is necessary to check whether the national legislation of the foreign legal entity allows the emigration without winding up the entity. In some countries

this is apparently not the case: the UK, for example, does not have a specific procedure for allowing the transfer of the registration of a UK-incorporated legal entity from the UK to another country.

To overcome this obstacle, some UK legal entities have used another procedure, namely, requesting a private Act of Parliament, which authorises the transfer of the relevant company's registered office from the UK to another country, and allows the English registrar of companies to strike off the company's name from the register and to treat it as no longer being subject to UK corporate legislation. However, this procedure, which apparently has proved to be successful, is expensive and cumbersome.

4. General assemblies requiring the presence of a notary public

The CAC did not modify the provisions on the cases where the decision of a general assembly of an INPA to modify the statutes should be registered under the form of a notarial deed. Many INPAs do not hold their general assembly in Belgium but combine it with their board meeting and with an annual congress held each year in another country. In some cases, the location of the congress is scheduled many years in advance. For INPAs with a large membership, it can be too expensive or too difficult to organise a separate extraordinary general assembly in Belgium or to modify the scheduling or the location of the congress.

Under the current legislation (CAC), it is still not possible to combine a location of the general assembly outside Belgium and the presence of a Belgian notary (when required by law) at the meeting simply because Belgian notaries are not allowed to enact deeds abroad. However, it is also not possible to hold the meeting without the presence of a notary public if the statutes are to be modified.

There are different ways to resolve this issue.

Firstly, by including in the statutes a provision allowing for the organisation of electronic meetings: clear and complete rules should be included in the statutes for the organisation of virtual meetings or partially virtual meetings. These articles should be completed by internal rules on the security and all the technical aspects of such meetings. Since the outbreak of the COVID-19 crisis, virtual meetings are tending to become common practice. Some notaries are indeed organising virtual general assemblies, convened for a modification of the statutes (on such points as require an authentic deed). The meeting would be considered as partially virtual and as taking place physically in the notarial office in Belgium, if at least one member (or its representative), who can show evidence of their voting right, can be physically present, while all other members would be virtually present, according to the statutory provisions.

A second solution lies in organising a general assembly in the foreign country with the presence of a local notary[3] : in case of absence of specific provisions on virtual meetings and in case the statutes contain limited possibilities for working with proxies, the association in

[3]. Local notary or, if this is foreseen by local legislation in the country and accepted in Belgium, a lawyer.

question could still consider organising an extraordinary general assembly outside Belgium. In that scenario, it should take place in the presence of a local notary, who would enact the deed. In a second phase, the procedure should be repeated by a Belgian notary in the presence of a single proxy holder, appointed during the first general assembly. In practice this option appeared to be successful, but since it is a long and complicated procedure (often including translations), opting for a virtual meeting is clearly simpler. Such a procedure should of course be included from the outset in the statutes.

5. Delay in obtaining the AISBL / iVZW status

One of the inconveniences linked to the choice of INPA as a legal form is the length of the procedure with the Ministry of Justice for the AISBL/iVZW to obtain legal personality. The Ministry of Justice's attention has been drawn to this issue by the international associations sector[4] during the parliamentary adoption of the new CAC; nevertheless, this issue could not be resolved by the law alone.

The legal existence of INPAs for which the incorporation deed has been signed is not enforceable against third parties before the Royal Decree granting legal personality has been issued. During the period for processing the application, generally from two to four months after the notarial deed, the INPA cannot yet, in practice, conclude contracts, open bank accounts, negotiate with third parties, hire personnel, and so on. For international associations which quickly need to be fully operational, one of the possibilities available is to first set up an NPA by private deed, which can, immediately after publication of the extract of its deed of incorporation in the annexes of the Belgian Official Journal, be converted into an INPA (by notarial deed), since the CAC now provides for this possibility of conversion (art. 14:46). When waiting for the Royal Decree to be issued, the NPA-entity already has legal personality, which must be recognised by third parties, and can proceed with concluding contracts, and so on.

Public benefit foundations are confronted with the same issue. To save time, many proceed in the same way, namely, first by constituting a private foundation, which is later converted into a public benefit foundation.

6. Commercial activities: a new income stream ? Tax implications

With the disappearance of the distinction between "civil acts" and "commercial acts" and the formulation of the definition of the term "enterprise" in the Belgian Code of Economic Law, the CAC has integrated company law and association law, implying that association law is ever more aligned to company law.

One of the significant changes has been the new definition of the "association" laid down in Article 1:3 CAC : associations are henceforth explicitly authorised mainly to carry out any type of economic activity (including activities of industrial or commercial nature without

4. See position paper on the draft CAC text sent by the FAIB on 26 April 2018.

limitation), provided that such activities fall within the object serving the achievement of the non-profit purpose of the association. In other words: associations are allowed to conduct any activity to secure the required resources for financing the realisation of their non-profit purpose, without necessarily resorting to membership fees, donations or subsidies. However, in the light of the new definition, associations are prohibited from distributing or granting directly or indirectly any patrimonial benefit (for example through excessive remuneration paid to Directors, excessive office rent paid to a member owner of the office building, to its founders, members, Directors or any other person, unless the granted/distributed patrimonial benefit falls within the object and the achievement of the association's non-profit purpose. The distinguishing feature between companies and associations will hence no longer be the type of activities they carry out, but whether they distribute profits or grant direct or indirect patrimonial benefits resulting from these activities. Companies are incorporated to attain the object as determined in their statutes, to distribute their profits to their shareholder(s) as a compensation for their contributions. Inversely, associations are forbidden from distributing directly or indirectly any profits or granting any direct or indirect patrimonial benefit to their founders, members or Directors. However, the distinguishing feature is not that clear. By stipulating, even as an exception, that associations are allowed to provide free of charge services to their members that fall within the object and the non-profit purpose of the association, article 1:4 CAC finally allows associations, as in the case of companies, to grant certain indirect patrimonial benefits to their members. It is hoped that case law and legal doctrine will give further guidance on the distinguishing criterion in the upcoming months.

From a tax perspective the fact that associations are authorised to carry out (mainly) economic activities will be less relevant and not fundamentally impact their VAT status (as associations could already be subject to VAT before the adoption of the CAC). Nor will this fact have an impact on compensatory tax for the inheritance tax status, which remains applicable after the adoption of the CAC. In terms of their income tax status, however, a different picture emerges. Under the Law of 27 June 1921, most INPAs located and subject to tax in Belgium were subject to income tax on legal entities pursuant to the provisions of Articles 181 or 182 of the Belgian Income Tax Code 1992 (the "**ITC92**"). The latter results - in principle and in most cases - under a more favourable tax treatment than that of the corporate income tax regime. Given that, under the CAC, INPAs have more economic freedom and are allowed to carry out (mainly) the types of economic activity of any ordinary company, their subjection "by default" to the income tax on legal entities rather than to the corporate income tax is far less obvious than under the 1921 Law. In practice, the determination of the income tax status of an association remains a question of analysis of the facts and drawing a clear red line is not always obvious.

If an INPA decides to conduct mainly economic activities, it will in principle always be subject to corporate income tax. Running a business, or an activity with a lucrative purpose (without falling under the scope of the exemptions of Article 181 of the ITC92), is the only criterion for determining whether the INPA should be subject to corporate income tax. In deciding whether an INPA is engaged in a business activity, reference should be made not only to its statutory purpose, the main factor is the activity that is effectively carried out (a factual analysis is of utmost importance). The term *"carried out"* refers to the activity of exploitation, which requires a constant, actual and current activity. Corporate income tax

applies to all the profits made by the INPA. Some expenses have to be (partially) considered, for tax purposes, as disallowed expenses (not deductible for tax purposes). The ordinary corporate tax rate is 25 % as of 2020. Membership fees could, for example, be subject to taxation as profits.

An INPA which carries out economic activities could, however, remain subject to income tax on legal entities in the following cases :

- the activities fall into one of the "privileged domains" listed under Article 181 of the ITC92 and are performed in that framework (for example if the exclusive or main purpose of the association is the study, the protection and the development of the (inter)professional interests of its members, etc.);

- the (economic) transactions are exceptional or isolated (Article 182, 1° ITC92);

- the (economic) transactions consist in the investment of funds collected within the framework of the statutory mission of the associations (Article 182, 2° ITC92);

- the (economic) transactions are only incidentally industrial, commercial or agricultural transactions OR the transactions do not implement industrial or commercial methods (alternative criteria - Article 182, 3° ITC92).

The income tax on legal entities only applies to the several sources of income as exhaustively listed under Articles 221 to 224 of the ITC92. Furthermore, the tax on such specific income is equal to the withholding taxes on movable and immovable properties which fully discharges their Belgian income tax liability in this respect. Membership fees, for example, are not subject to any taxation.

The law of 17 March 2019 on the transition from legal entities tax to corporate income tax introduces into the ITC92 the new Article *184 quinquies*. According to the explanatory memorandum, the purpose of this provision is to provide a clear and unambiguous legal framework for entities previously subject to income tax on legal entities and now subject to corporate income tax. The law provides which elements must be taken in consideration, including issued capital, available reserves and deductible costs for corporate tax purposes. In practice, it will apply in particular when, in the course of a tax audit, the Belgian tax administration considers that an entity subject to the tax on legal entities should have been subject to corporate income tax. Belgian tax authorities now have clear rules for subjecting an INPA to corporate income tax if an INPA no longer complies with the legal requirements for being subject to income tax on legal entities. Consequently, caution is advised in the choice of the economic activities INPAs undertake so as not to jeopardise their income tax status or subsidies.

In practice, INPAs seem, so far, very reluctant to make use of the new economic freedom granted by the CAC in terms of carrying out mainly economic activities, precisely because of the fear of having their legal entity income tax status changed into the less favourable corporate income tax status. To date, the provision authorising INPAs to carry out (mainly) economic activities remains untested in practice. On the contrary, experience has shown

that INPAs, in the framework of the revision of their statutes, very often explicitly emphasise in their purpose, the incidental, isolated or exceptional character of potential economic activities/transactions they carry out to achieve their non-profit purpose.

If there is a will to exercise mainly economic activities, founders tend to incorporate their entity, ultimately, under another legal form, like a company. Existing INPAs that have the same intention very often reorganise their corporate structure and incorporate, alongside the INPA, a company into which they outsource the economic activities with a lucrative purpose. This allows making a clear distinction between the different activities and the two tax regimes applicable to these activities.

The legal changes mentioned above have certainly provided the legislator with an opportunity to examine the question of the transition from income tax on legal entities to corporate income tax and vice versa and to align the criteria used in this context. Corporate law distinguishes companies, associations and foundations according to the criterion of distributing/granting (direct or indirect) patrimonial benefits, while tax law continues to distinguish corporate income tax and income tax on legal entities according to the nature of the activities carried out by them. It would have been more judicious if the legislator had seized the opportunity to align the criterion used in the framework of the tax rules with the criterion used in the new definition of the association, that is, the absence/prohibition of distributing/granting (direct or indirect) patrimonial benefits to founders, members, Directors or any other person.

7. Governance issues

The Belgian legal framework for INPAs under the Belgian Law of 27 June 1921 on non-profit-making associations, non-profit-making international associations and foundations was very concise. Two corporate bodies were mandatory, namely, the *"General Management Body"* or *"Directional Body"*[5] and the *"Governing Body"*. The Law only provided for three exclusive powers for the General Management Body, that is, approving the accounts and the budget and approving the contribution of a line of business or a universality into another (I)NPA. Three powers were attributed to the Governing Body, namely, the preparation of the budget and the accounts and the appointment of the statutory auditor.

The aim was to allow INPAs to benefit from a high degree of freedom and flexibility to organise their governance structure as they saw fit. Article 48 of the 1921 Law provided in this respect that the statutes needed to include an overview of the competences of the Governing Body and the General Management Body. Contrary to what applies for companies, the *"residual"* powers were not attributed to the Governing Body. Legal doctrine stated that, without any statutory provision, it was in fact the General Assembly that was competent for the residual powers. Choosing and organising the most appropriate governance model in the statutes for the organisation was, and remains, therefore extremely important.

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Under the new CAC, the key principle of flexibility is maintained. The statutes still need to define the competences of both corporate bodies. The "General Management Body" has been renamed "General Assembly" more in line with the term used for companies with legal personality. The matters reserved for the General Assembly are also clearly defined:

- nomination and dismissal of the statutory auditor;
- approval of the annual accounts;
- all matters as required by law or the statutes.

Although this is not explicitly stated by the CAC, by adding this last category, a logical consequence would be to conclude that the residual powers are now given to the Governing Body. One could, however, still envisage attributing the residual powers to the General Assembly in the statutes.

Under the new CAC, the creation of other bodies remains possible. Flexibility thus remains key. Initially, the CAC explicitly provided for the possibility for the Governing Body to delegate the daily management, as well as the representation within the context of the daily management to one or more persons, acting alone, jointly or as a collegial body (old article 10:10 CAC). This article was however deleted by the Law of 28 April 2020 amending the CAC; one of the reasons for this being that it had limited the flexibility to organise the governance within an INPA. Indeed, article 10:10, provided that only the Governing Body could delegate the daily management, thus limiting the possibility for the General Assembly to delegate such power. Also, article 10:10 CAC provided that that the creation of this corporate body was opposable towards third parties and that the INPA could be, within the limits of the daily management, validly represented by the appointed daily managers, if such appointment had been duly published in the annexes to the Belgian Official Gazette "Prokura-theory"). This Prokura theory however does not apply for the other corporate bodies of the INPA.

In practice, even before the CAC, an INPA's statutes were already often tailored to the standard statutes for NPAs, whereby the traditional powers of the General Assembly (nomination and dismissal of Directors, modification of the statutes, drafting of internal rules, etc.) are reserved to the General Assembly whilst the overall management of the organisation is the domain of the Governing Body. In larger INPAs, it is not uncommon to also create other bodies, like the Secretary General (often entrusted with the day-to-day management), an advisory board, a remuneration committee, a financial committee, a treasurer and so forth. Internal rules, codes of conduct, clearly defined governance policies or a social governance charter are in place in only a limited number of cases. It is often, although not always, expressly stated that the Governing Body holds the residual powers.

Although, at first sight, it seems that the CAC has not impacted the basic principles of governance of INPAs significantly, we observe that many INPAs are concerned and are currently seeking advice in respect of their governance structure, not so much because INPAs are now enterprises, with an unlimited possibility to perform economic and commercial activities, but mainly to examine whether their statutes still fit the kind of organisation they have become or want to be in terms of governance.

For example, one of the concerns often relates to the use of internal regulations. As set out above, article 2:59 of the CAC provides that the administrative body of a legal entity (a company, a non-for-profit organization, a foundation…) has the power to issue internal regulations, subject to prior statutory authorization.

However, the legislator had set some limits as to the content of such internal regulations by providing that internal regulations could not contain the following:

- 1° Any provisions contrary to mandatory legal provisions or to the statutes;
- 2° Any provisions relating to matters for which the CAC requires a provision in the statutes;
- 3° Any provisions affecting the rights of members, the power of the organs or the organisation and the functioning of the General Assembly.

Most INPAs struggled with the application and the interpretation of Article 2:59 CAC. Therefore, most INPAs were adopting a precautionary approach by including such provisions in the statutes which in turn has the negative effect of leading to very lengthy and burdensome statutes.

The Constitutional Court has recently annulled article 2:59, 3° CAC, the reason being that any difference in treatment between cooperative companies and other entities governed by the CAC (including INPAs) was not justified .

As a result of this annulment, internal regulations may now contain provisions "affecting the rights of members, the powers of the bodies or the organisation and operating procedure of the General Assembly. However, the Constitutional Court also stated that this is only allowed on condition that such internal regulations are approved by a decision taking into account the same special presence and majority requirements as the ones that must be met to amend the statutes.

Although, at first sight, this might not have a big impact on companies, it will certainly affect other legal entities, such as INPAs, which often choose to include certain aspects relating to the rights of their members and the functioning of certain bodies, such as their Governing Body, working groups and task forces, in internal rules and which had been restricted in doing so because of article 2:59, §3B CAC. In future, they will have to meet the presence and majority requirements applicable to amendments to the statutes.

Another concern for many INPAs relates to the COVID-19 crisis and the consequent lockdown which has given rise to numerous questions mainly with respect to the organisation of the General Assembly, the possibility of postponing it, and whether it can be held remotely or if written resolutions are possible.

Legal doctrine was until today divided on the question of whether it was possible to organise meetings remotely or by unanimous written resolutions within an INPA because of the lack of any provisions in our legislation. Again, the CAC has not provided anything specific in this

respect for INPAs. Therefore, without statutory provision allowing this, it was not advisable to do so, since this could in theory be invoked as a ground to annul the decisions taken.

To avoid any uncertainty, INPA statutes already often included provisions that allow board meetings or general assemblies to be held by video or conference call, while giving no details on the specific procedure to be followed. The possibility of written resolutions was seldom provided because, unlike the case of remote meetings, in most cases written resolutions are taken without any prior deliberation. Therefore, the validity of such resolutions, especially without any statutory provision allowing this, was even more questionable.

The fact that during the first outbreak of COVID-19 a special Royal Decree No. 4 of 9 April 2020 allowed all legal entities to organise remote meetings, notwithstanding the content of their statutes confirms the fact that holding remote meetings without statutory provisions allowing this, could indeed be considered unlawful. The COVID-19 crisis will most likely result in INPAs wanting to amend their statutes as soon as possible to provide for a detailed procedure to allow them to organise their board meetings and/or general assemblies remotely/electronically, or postpone their general assemblies, if need be[6]. Indeed, since the CAC is silent on those possibilities, it seems advisable to explicitly provide for specific procedures for remote meetings in the statutes.

8. Bankruptcy provisions

Since 1 May 2018, INPAs are governed by Book XX of the Belgian Code of Economic Law related to "insolvency of undertakings". As a result, new insolvency procedures apply to INPAs, including the bankruptcy procedure.

According to data collected from STATBEL (the Belgian statistical office), only five INPAs have been declared bankrupt between May 2018 and March 2020. This number of INPAs going bankrupt is very limited. However, it underlines that such a procedure is being applied to INPAs in practice and constitutes, therefore, a new reality for these legal entities.

The extension of the scope of application of insolvency law to INPAs results in new liabilities for its Directors, as detailed in several articles of the Code of Economic Law:

- Art. XX. 225 : liability for part or all the debts resulting from the asset shortfall in case of serious and manifest fault contributing to the INPA's bankruptcy;

- Art. XX. 226 : liability for unpaid social security contributions if, in a period of five years before the bankruptcy, Directors have been involved in at least two bankruptcies or liquidations of other undertakings where social contributions were not paid;

• Art. XX. 227 : liability for part or all of the debts resulting from the asset shortfall in case of "wrongful trading", meaning a situation in which (i) the Directors knew, or should have known, that at some time before bankruptcy the INPA clearly had no reasonable prospect of preserving the INPA or its activities and avoiding bankruptcy, and (ii) the Directors did not, at that time, act as a normally prudent and diligent director would have acted in the same circumstances.

This reform contributes to the professionalisation of the sector, with a growing trend towards assimilation of the legal provisions applicable to INPAs and companies.

9. Directors' liability

The Law of 27 June 1921 was very concise with regard to directors' liability : Article 49 explained that Directors and daily managers were not personally liable for the obligations of the INPA, but that the Directors were responsible for their tasks and liable for any *"shortcomings in their management".* In essence, this meant that they could be held liable for breach of management duties, the statutes, the provisions of the Law of 27 June 1921 or even, in rather exceptional circumstances, for torts, towards the INPA itself (represented by its members). In assessing this, a court would have to look at what a normally prudent and conscientious Director would have done in the same circumstances. For external liability towards third parties, it was even more difficult, since such third parties needed to prove a breach of the general duty of care (article 1382 of the Civil Code). The liability was an individual liability, but the court could decide that there was joint liability in specific circumstances, such as a joint fault. The limitation period was ten years for internal liability, and five years for external liability.

The CAC has introduced a harmonised framework of directors' liability for all legal entities. The most important general liability grounds outside bankruptcy remain :

• liability for management errors (that is decisions, actions or behaviour that apparently fall outside the margin within which normal, prudent and careful Directors, placed in the same circumstances, can reasonably be expected to avoid);

• and liability for damages resulting from a violation of the Articles of Association or the provisions of the CAC (such as not filing the annual accounts).

Under the new CAC, the liability of the Directors is a joint liability, which means that damages can be claimed from each Director for the entire amount, if the management body of the INPA is a collegial body. If the Directors do not form a collegial body, the Directors are in principle only jointly liable for infringements of the Statutes and the provisions of the CAC. However, for errors in which they have not participated, they are released from their liability if they have reported the alleged error to the (other members of the) Governing Body.

The limitation period has been set at five years for all liability grounds. The CAC has also limited the hold-harmless practices since it explicitly provides that legal entities may not

exonerate or indemnify their Directors in advance for their liability towards the INPA or third parties.

The CAC introduced liability caps, which depend on the association's balance sheet total and turnover but which do not apply in the case of gross breach of the duty of care or repeated minor breaches of the duty of care, intentional fault, fraud.

It is, however, mainly the reform of the Code of Economic Law that seems to cause additional stress for INPA Directors. Because INPAs are all considered to be enterprises since 1 May 2018, they can also be declared bankrupt. The Code of Economic Law provides for special bankruptcy liability grounds, as explained above.

Many INPAs are concerned because of the new far-reaching provisions on Directors' liability introduced by the reformed Code of Economic Law and are seeking advice in this respect. Obviously, potential Directors are (likely to be) more reluctant to take up directorship positions if they are not properly informed.

Due to the significantly changed legal framework of Director's liability, it will be more important than before that Directors are duly informed of their potential liability, as well as of how the corresponding risk can be limited to a maximum extent. One 'solution' to limit the risk consists in granting release to Directors during the General Assembly for the performance of their duties during the past financial year. However, it must be noted that release does not cover the risk of external liability, which is the liability of the Director towards third parties. To mitigate the risk of Director's liability, INPAs are advised to acquire "Directors and Officers (D&O)" insurance for their Directors. Usually, such insurance policies cover the liability grounds (except penal liability) for management decisions by directors and officers, irrespective of whether they are remunerated or not.

10. Publications in the Belgian Official Journal : pitfalls

Various decisions taken by INPAs must be published in the Annexes to the Belgian Official Journal, as provided under article 2:16 of the CAC. The process to have extracts of decisions taken by bodies of INPAs published in the Annexes to the Belgian Official Journal can prove to be cumbersome. Indeed, in the absence of certain information or documents, the Enterprise Court will refuse to publish extracts filed by INPAs.

It is not within the scope of this article to explain all the rules that need to be observed when sending documents for publication. Instead, this contribution identifies specific requirements that are sometimes overlooked by INPAs when dealing with publication obligations.

The recommendations that follow deal only with the administrative guidelines imposed by the Enterprise Court of Brussels, given that INPAs are overwhelmingly established in Brussels:

• the French-language section of the Enterprise Court of Brussels requires an identity statement completed by the person filing the documents to be submitted together with the documents for publication. A copy of an identity document of that person must be attached to the identity statement (see Annex for the models). Conversely, the Dutch-language section of the Enterprise Court of Brussels does not necessarily require such a document, although, as the case may be, it is necessary to include in the extract a power of attorney showing that the person signing the forms is authorised to do so. Apart from this distinction between French-language section and Dutch-language section of the Enterprise Court of Brussels, the other comments below apply without distinction to both sections of the Enterprise Court of Brussels;

• there are two distinct forms (Form I and Form II) for publication, which are now the same for all legal persons (*i.e.* companies and associations). These documents must be printed one page per sheet (no double-sided printing). Form I must always be submitted, while Form II must only be sent when information in the Crossroads Bank for Enterprises ("**CBE**") must be updated. Three copies of Form I (each form consisting of Sections A, B and C) are required. Each Form must be signed on the back of the last page of section B. Only one copy of Form II (consisting of Sections A and C) is necessary, which must be signed in the lower-right-hand corner on the front of Section C. In case the space allocated on one Form II is not enough for registering all the modifications to be made in the CBE, several Forms II need to be used. General information on this subject is available on the website for the Enterprise Court of Brussels;

• when a publication is related to the resignation or appointment of Directors, the name, surname and domicile of these Directors must be provided on Form I. That said, if Directors are reluctant to have their private addresses published, they may provide another address that they are electing as domicile on the form (for example, a professional address or the address of the INPA). In such case, the fact that a Director is electing their domicile at such an address must clearly be stated on Form I;

•Supporting documents are needed from Directors under the following circumstances:

  ○ when the publication is related to the resignation (or dismissal) of Directors or the appointment of new Directors, a copy of both sides of the identity card or passport of each Director is required;

  ○ when the publication is related to Directors that are newly appointed, in addition to what is stated in the preceding item, proof of (private) residence of each newly appointed Director will need to be given (e.g., certificate of residence, or more simply a utility bill bearing the name and address of the Director, or the original version of a sworn statement stating the private address of the Director and signed by the Director in question). Please note that such proof of residence will be requested by the Enterprise Court even if the identity card or passport of the Director lists an address of domicile and

even if a Director is electing domicile at a professional address in the form for the publication;

○ for Directors being re-elected (that is, Directors already in place and who have already been identified by the Enterprise Court), no supporting document is needed.

• if the statutes of the INPA are modified, a coordinated version of the Articles of Association must be annexed to the documents and be signed by a person representing the INPA. One should bear in mind that, as from 1 January 2020, any modification to the Articles of Association (for example, a simple change of name for an INPA) entails an obligation to modify the statutes so as to make them fully compliant with the new CAC. Moreover, at the latest on 1 January 2024, INPAs must have adapted their statutes to the CAC;

• a modification of the object of an INPA must be approved by Royal Decree (the additional process of which takes generally at least two months). If the notary public does not handle the publication, the INPA must ensure that a true copy of the Royal Decree is attached to the documents for the publication;

• signed minutes of the Meeting that took the decisions to be published must be enclosed as well. Since confidential information is often contained in these minutes, various INPAs are reluctant to send the full version of the minutes to the Enterprise Court. For that reason, the Enterprise Court will proceed with the publication if a more limited extract of these minutes, containing the decisions to be published and signed by a person entitled to represent the INPA, is enclosed;

• if it is impossible for the INPA to obtain a required supporting document (such as the identity document of a resigning Director with whom the INPA is no longer in contact), a document justifying the impossibility of getting such document, signed by a person entitled to represent the INPA, must be sent together with the documents for publication;

• proof of payment of the exact publication costs must be enclosed. It should be borne in mind that publication costs are modified each year in March (currently until the end of February 2021: 133.58 EUR VAT included for acts modifying existing INPAs);

• previously, when a publication was related to the transfer of the registered office of the INPA, a copy of a document proving the occupation of the premises (such as a lease agreement) was requested. However, after verification with the services of the Enterprise Court of Brussels on 7 May 2020, such a document is no longer necessary.

INPAs should not hesitate to seek confirmation of the formalities applied by an Enterprise Court before sending them the forms and documents for publication in the Annexes to the Belgian Official Journal, as customs may vary from court to court.

11. INPAs and the UBO Register

Since 1 January 2020, after a period of tolerance applied by Belgian authorities, INPAs must register their Ultimate Beneficial Owners ("UBO") in the so-called UBO Register. Indeed, although not imposed by European legislation (the so-called Money Laundering Directive-(EU) 2015/849), the Belgian authorities have decided to include INPAs in the scope of application of the UBO requirements.

After determining the persons that qualify as UBOs of the INPA (five different categories of UBOs of INPAs are established), these UBOs must be identified in the UBO Register via an online platform[7].

INPAs may give a mandate to a person inside their organisation, or an external mandate (for instance to an attorney, accountant, etc.) to address these formalities. External mandates must be given by a person already identified in the CBE as having a mandate in the INPA (such as a Director or the person in charge of daily management). If that person has a Belgian identity card, they can easily give such external mandate electronically. If no one identified in the CBE for the INPA has a Belgian identity card, then a slightly more time-consuming paper mandate procedure may be followed. Various documents containing general information on the UBO requirements are available on the website for the Federal Public Service Finance.

One should note that the data already recorded for an INPA in the CBE can be conveniently reproduced in the UBO Register. Therefore, if the information registered in the CBE is correct, it is possible to register easily most INPA UBOs.

The Belgian administration will shortly carry out checks concerning the observance of the UBO requirements. INPAs should therefore ensure that they comply with these obligations. Failure to do so may notably result in administrative fines ranging from 250 EUR to 50,000 EUR being imposed.

12. Conclusions: gains and losses for INPAs with the CAC

If it is clear that, from a conceptual perspective, the codification of the main legislation affecting companies and associations is attractive, there are still major differences between associations and companies, if only in the structure of their stakeholders and the reasons for generating income. There is also little doubt that the law will facilitate INPAs becoming more "business-minded" : this is fast proving essential as members are becoming more restrictive at the level of funding and even more so with the disruption of business because of COVID-19.

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[7].This online platform can be accessed here : https://finance.belgium.be/en/E-services/register-beneficial-owners.

The CAC has introduced new elements like national and international transformation which will make Belgium more attractive. Nevertheless, successive bits of legislation, whether the transposition of the EU Money Laundering Directive, accountancy practices and now the CAC have introduced further complexity into the daily life of INPAs even if they have assisted in professionalising the sector. INPAs tend to be micro entities or at most SMEs; now they are increasingly finding the need to reallocate funding, reserved for their object, to administration. This is unwelcome but seems to be part of the increasing trend to regulate all economic activity.

However, that which will ultimately be most important in the wider economic context for Belgium will be how the legislation is applied and how smoothly the interactions between INPAs and the Belgian administration are managed.

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Annex 1 : Models of identity statement used by the French-language section of the Enterprise Court of Brussels

GREFFE DES PERSONNES MORALES Tél. : 02/348.96.70
Bd de la Deuxième Armée Britannique, 148 Fax : 02/348.96.77
1190 Forest

Attestation d'identité pour le dépôt d'un acte de personne morale modèle 1*

***Le modèle 1 est destiné à l'usage des particuliers et des mandataires professionnels non-agréés**
(veuillez fournir une copie recto-verso de votre carte d'identité)

Je soussigné(e) Madame /Monsieur……

né(e) le ……à……..

n° de registre national :…….-……-……...

domicilié(e) à …….

numéro de téléphone :……

agissant pour la société[8] ……

agissant pour la société ou l'asbl[9] ……..

en qualité de ……..

atteste déposer les actes visant à un(e) ou plusieurs :

☐ Constitution
☐ Nomination(s)
☐ Démission(s)
☐ Transfert de siège social
☐ Autres modifications : ……

en date du …../…../…….

Signature

8. Veuillez indiquer l'entreprise pour laquelle vous travaillez (bureau comptable XX, fiduciaire XX, société XX).
9. Veuillez indiquer le nom de l'entité pour laquelle vous déposez les formulaires.

GREFFE DES PERSONNES MORALES Tél. : 02/348.96.70
Bd de la Deuxième Armée Britannique, 148 Fax : 02/348.96.77
1190 Forest

Attestation d'identité pour le dépôt d'un acte de personne morale modèle 2*

***Le modèle 2 est destiné à l'usage des mandataires professionnels**
(veuillez fournir une copie recto-verso de votre carte d'identité ou carte d'avocat, le cas échéant)

Je soussigné(e) Madame /Monsieur……

Membre de l'Institut, de la Chambre ou de l'Ordre Professionnel

OBFG ☐ VB ☐ IJE ☐ IPCF ☐ IEC ☐ IRE ☐ ITAA ☐ AVOCAT ☐

Numéro de membre : ……

Agissant pour le cabinet : ……

Numéro de téléphone/GSM ☐☐☐☐☐☐☐☐☐☐

Agissant pour la société/l'association : ……..

en qualité de ……..

Déposé par[10] ……..

Atteste déposer les actes visant à un(e) ou plusieurs :

☐ Constitution
☐ Nomination(s)
☐ Démission(s)
☐ Transfert de siège social
☐ Autres modifications :……

Et avoir, en vertu de mes obligations déontologiques, identifié les intervenants concernés par la présente publication en date du …../…../…….

Déposé le …../…../……

Signature

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[10]. Dans le cas où les documents sont déposés par un employé/stagiaire (indiquer nom, prénom et fonction + joindre copie de la carte d'identité)