

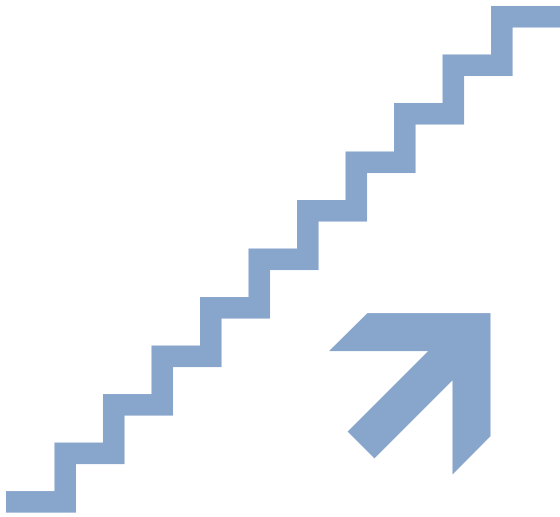
NEW CODE OF COMPANIES  
AND ASSOCIATIONS

# 10 STEPS MAKE A GIANT LEAP

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The act of **23 March 2019** implements a major modernisation of Belgian company and association law. The new Code of Companies and Associations will gradually apply from **1 May 2019** onwards.

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# 10 STEPS

make a giant leap

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*Simplification and flexibilisation of organisational law are the guiding principles of the Code: users will find simple, ready-to-use rules, while at the same time enjoying considerable freedom to tailor any company or association to their specific needs.*

## 1. Corporate forms



*The new Code of Companies and Associations reduces the number of corporate forms while expanding flexibility within the remaining corporate forms.*

The private limited liability company (BV/SRL) has been thoroughly restyled and should become the standard legal person in Belgian company law. The public limited liability company (NV/SA) remains subject to the European capital rules and is likely to remain the corporate form of choice for larger and listed companies. Both the BV/SRL and the NV/SA can be incorporated by a single legal entity or individual. The cooperative limited liability company (CV/SC) will be reserved for true cooperative purposes (*cf.* the ICA principles) and requires three founders, but otherwise basically follows the rules of the BV/SRL.



## 2. The BV/SRL (private limited liability company)



The BV/SRL is remodelled as a flexible company without capital. In its basic legal appearance, it is straightforward and simple. At the same time, the Code leaves ample room for contractual structuring (*e.g.* unlimited multiple voting rights or preference shares). It will become possible to provide for flexible mechanisms for shareholder withdrawal and exclusion.

The new BV/SRL is a flexible company without capital.

Incorporating a BV/SRL no longer requires a minimum amount of capital. However, the founders must provide for sufficient equity in view of the envisaged activities, taking into account the other financial parameters. All of this must be supported by a more extensive financial plan.





The concept of capital is also referred to in several tax provisions (e.g. the participation exemption on dividends received, which requires a minimum participation of 10% of the share capital of the distributing company). As mentioned above, Belgian tax law has been amended to ensure the tax neutrality of the new rules.

**Creditor protection is assured by a new double test applicable to all distributions** (dividends, return of contribution, consideration for selling shares to the company, compensation upon withdrawal or exclusion), including a net asset test and a liquidity test.

### 3. *Managing a company*



Governance models in the BV/SRL and the NV/SA have been revisited and streamlined. The NV/SA can choose between three models: monism (single board of directors), dualism (supervisory board and management board) or a sole director. In the BV/SRL the standard remains one or more fully competent directors but, as is the case now, a collegial body can be organised. A day-to-day management body is optional in all companies and associations. Written decision-making is simplified.

Dismissal of directors at will by the shareholders meeting remains the standard, but on the other hand, room is made for protection against dismissal if so desired. In this respect, the NV/SA with a sole director is now a fully-fledged anchoring technique both in listed and in non-listed entities.

The NV/SA offers the choice between three governance models.

**The new Code confirms that directors, in their capacity as directors, are independent** and not employees. The system of mandatory representation of a legal person acting as a director by a permanent representative is maintained and even tightened: the permanent representative must be a natural person, and he/she cannot sit on the board in more than one capacity.

In all types of companies and associations, directors with a conflict of interests will have to abstain from participating in the deliberation and voting.

The Code specifies the basic requirement for each member of an administrative body to carry out his/her duties properly, as well as the standard for assessing directors' liability: each director should act within the reasonable margin of what a normally prudent and cautious director would do in the same circumstances.

A noted innovation is the creation of a **financial cap** on the liability of directors, varying with the size of the company, with exceptions for recurrent light faults, gross faults and fraud and some specific tax related liabilities.

## 4. Securities



The Code does not introduce major changes in the field of securities, but confirms generally accepted rules and major case law, as well as tidying things up.

In the BV/SRL, the previous mandatory and very strict legal regime limiting transferability of shares becomes only the default rule and can be overruled by the articles of association.

**Both the BV/SRL and the NV/SA can issue all types of securities not prohibited by law.** However, a BV/SRL can only issue shares in exchange for a contribution and can attach voting rights only to shares.

Furthermore, the Code confirms, in line with case law, that a shareholder can be exempted from contributing to the losses. In addition, it is confirmed that restrictions on the free transferability of shares in the articles of association are enforceable vis-à-vis the purchaser: the company cannot recognise transfers violating those restrictions.

In the field of bonds, the role of the security agent has been codified and a series of Belgian rules have become default rules, leaving room for Belgian entities to issue bonds subject to foreign law.

## 5. Voting rights



**The BV/SRL and the NV/SA are given much more freedom to opt for different share voting arrangements as they see fit.** The only mandatory rule is that the company must issue at least one share with one vote. Apart from that, the traditional mandatory principle of “one share, one vote” is set aside, even though it remains the default rule. In the BV/SRL and in the non-listed NV/SA, shares with unlimited multiple voting rights, shares without voting rights and shares with voting rights for specific situations can be issued.

In a listed NV/SA, however, shares can only acquire double voting rights if they are held in registered form by the same shareholder for at least two years and are fully paid up. A transfer of the share(s) causes the extra voting right to disappear, with some exceptions for family and intra-group transfers. The introduction of this double voting rights mechanism in a listed company requires a 2/3 majority (compared to the 3/4 majority for other changes to the articles of association).

Double voting rights are neutralised for calculation of the threshold for a mandatory takeover bid. In addition, a successful bidder acquiring 2/3 or more of the voting securities may force the abolition of the double voting rights mechanism.



## 6. Not-for-profit



The only criterion for distinguishing between companies and associations is the distribution of profits: while profit distribution to shareholders is the central purpose of companies, associations and foundations are simply prohibited from distributing profits directly or indirectly to their founders, members or directors. This does not prohibit them from providing services to their members if that falls within their purpose.

The integration of association law within one Code together with company law has also made it possible to streamline, fill gaps and clarify rules, without losing sight of the particular features and specific needs of the not-for-profit sector.

The distribution of benefits will be the only criterion to distinguish between companies and associations.

Companies specifically recognised by the Minister of Economic Affairs can dedicate themselves to social entrepreneurship, thus allowing a form of not-for-profit corporation.

## 7. The listed company



Both the NV/SA and the BV/SRL can be listed, but the NV/SA remains the standard for listed companies. Listing only means admission of shares, profit-sharing certificates or certificates relating to them to trading on a regulated market. Public interest entities (PIEs) are regulated separately.

The implementation of the amended Shareholder Rights Directive was not part of the legislative process that led to the Code. Consequently, the Code is bound to be amended soon, although changes are expected to be limited.

## 8. Conflicts between shareholders



The particularly successful procedure whereby a shareholder in a BV/SRL or a non-listed NV/SA can ask the court to either force another shareholder to sell his shares to the claimant (forced exclusion) or to buy his shares (forced retreat) at the price set by the court is maintained but is given increased procedural efficiency.

## 9. Choice of applicable law



**Belgium is switching to the statutory seat regime**, for both Belgian and non-Belgian legal entities. A legal person will be governed by the company/association law of the seat it chooses in its articles of association. Thus, a company with its statutory seat in Belgium will be subject to Belgian company law, regardless of whether it conducts its activities in Belgium or abroad. For corporate income tax purposes, however, the place of effective management will remain decisive in determining whether a company qualifies as a Belgian tax resident.

The Code includes a procedure for inbound and outbound statutory seat transfer.

In an earlier but related move, directors' liability related to insolvency was relocated within insolvency legislation (the Economic Law Code). Consequently, this liability applies when the centre of main interests (COMI) of an insolvent legal entity is located in Belgium.

## 10. Entry into force



**The new Code enters into force on 1 May 2019 onwards, and will become applicable in a gradual manner:**

- The Code will apply in full to new companies and associations as of 1 May 2019. Existing legal entities can opt in to the new regime from 1 May 2019 onwards.
- Existing legal entities will be subject to the new Code as of 1 January 2020. From that date onwards, mandatory provisions apply immediately (e.g. profit distribution rules in the BV/SRL), but for other provisions existing legal entities can await the next amendment to their articles of associations to adapt to the Code, it being understood that they must be fully complying with the Code by 1 January 2024 at the latest.

On 1 January 2020, the BV/SRL and the CV/SC will become, by force of law, companies without legal capital.

- However, the most important change, namely the transformation of the BVBA/SPRL and the CVBA/SCRL into a company without capital, takes place by force of law: as of 1 January 2020, the capital and the statutory reserve of all existing BVBAs/SPRLs and CVBAs/SCRLs will be transformed into a statutory non-distributable reserve which can be unlocked by an amendment to the articles of association.
- Existing legal entities with a company form that the Code abolishes are subject to the same ultimate deadline, and are converted by force of law into the closest surviving form if they have failed to take the necessary steps themselves in time.
- The switch to the **statutory seat regime will take effect as of 1 May 2019**.

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