

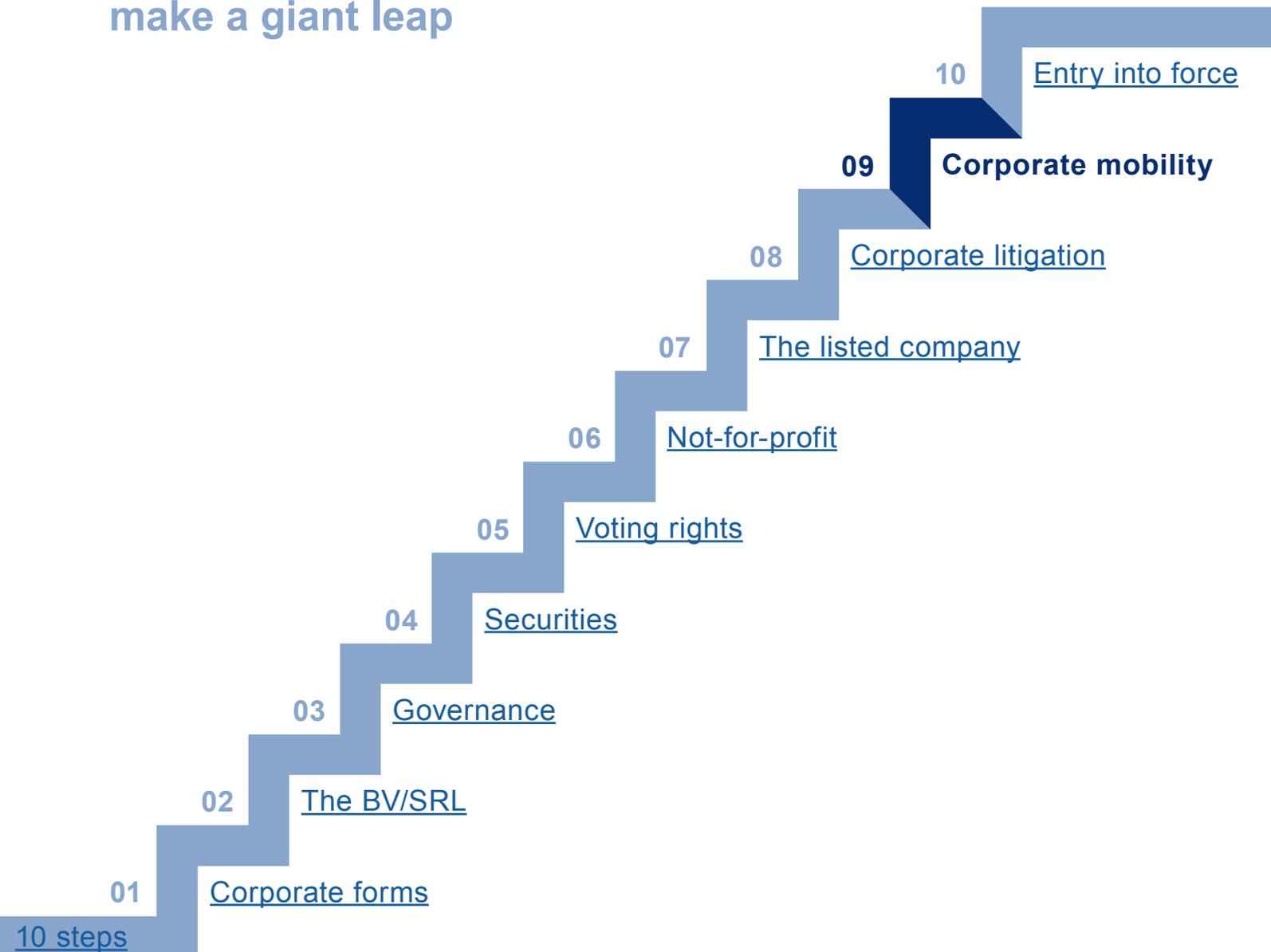
NEW CODE OF COMPANIES
AND ASSOCIATIONS

FROM REAL SEAT THEORY TO INCORPORATION THEORY

09

10 STEPS

make a giant leap





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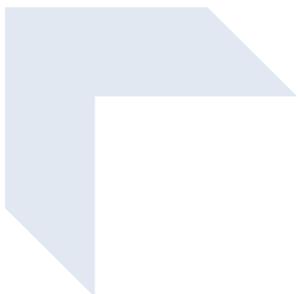
FROM REAL SEAT THEORY TO INCORPORATION THEORY

“FREEDOM AND LEGAL CERTAINTY”



One of the spearheads of the reform of Belgian company and association law is the changeover from the real seat theory to the incorporation theory, with immediate effect as from 1 May 2019. Whereas up until 30 April 2019 the applicable company or association law will depend on the jurisdiction in which the “principal establishment” of the legal entity is located, from 1 May 2019 onwards the legal entity will be governed by the company or association law of the jurisdiction in which the seat it specifies in its articles of association is located.

In opting for the incorporation theory, Belgium joins several neighbouring countries and major trading partners who have already been adhering to the incorporation theory for a long time (including the UK, the Netherlands, Switzerland, the US, Ireland and, for a number of years now, Germany). The purpose of this switch is to allow Belgian entrepreneurs to move their companies abroad, and to make Belgium more attractive as a country of establishment and a gateway to the European market.



More freedom and legal certainty

The switch to the incorporation theory allows greater freedom (of establishment) and also provides legal certainty: companies can now choose which company law applies to them, depending on their own needs and preferences.

Freedom

As a result of the case law of the Court of Justice on corporate mobility, Belgium must recognise companies which, according to the rules of their Member State of origin, are governed by the company law of that Member State, regardless of where they carry out their activities. For example, a company established exclusively in Belgium may be incorporated as a Dutch Flex BV.

For this reason, Member States (still) adhering to the real seat theory (including Belgium until 30 April 2019) are at a competitive disadvantage compared to Member States which have adopted the incorporation theory: while (some) foreign companies can immigrate to Belgium without having to comply with Belgian company law, in principle Belgian companies lose their Belgian nationality as soon as they emigrate abroad. The adoption of the incorporation theory removes this asymmetry.

Although the case law of the Court of Justice only concerns companies established in EU Member States, the Belgian legislator has opted for **worldwide application of the incorporation theory**. As a result, legal persons operating (only) outside the Europe Union can also make use of Belgian company law, and companies whose registered office is situated outside the EU are allowed to be established in Belgium (which could soon become relevant for UK Ltd companies, for example).

Legal certainty

Moreover, the choice of a formal criterion (the “registered office”) as the sole connecting factor for determining the applicable company law rather than a factual criterion (the “real seat”) provides greater legal certainty. When a Belgian company gradually transfers certain activities abroad, it has so far been uncertain which company law would apply to it. The concept of “principal establishment” is open to interpretation, making it impossible to determine the exact moment at which the real seat is transferred. However, the resulting situations of legal uncertainty will now become a thing of the past: **the company itself will declare which company law it is subject to by designating its country of residence in its articles of association**. Discussions about the exact location of the real seat are thus no longer relevant.

The applicable company law will now depend on an easily established formal criterion.

Concrete impact

Freedom of establishment

Determining whether a company is governed by Belgian law is thus no longer dependent on whether its principal establishment is located in Belgium, but on whether Belgium is designated as the company's country of residence in its articles of association. As a result, "foreign" companies can now also explicitly opt for Belgian company law, regardless of where they actually operate. For existing companies, however, this will require a cross-border conversion, which is also regulated in the new Code of Companies and Associations (and outlined below).

The switch from the real seat theory to the incorporation theory boils down to the following:

- **Belgian companies transferring their principal establishment abroad can continue to be governed by Belgian company law.** No adaptation of nationality or legal form is required.
- Foreign companies transferring their principal establishment to Belgium do not automatically fall within the scope of Belgian company law. They continue to be governed by the law of their State of origin, unless they formally decide to transfer their registered office to Belgium (under the procedure for a cross-border conversion, as set out below).
- Companies no longer run the risk of reclassification of their nationality and legal form by Belgian courts, as **the assessment is now based on the formal criterion of the jurisdiction in which their registered office is located rather than on factual elements and unclear criteria.**

Companies no longer run the risk of reclassification of their nationality and legal form by a Belgian court.

Accounting and annual accounts

This switch also means that companies which have their registered office abroad and conduct actual activities in Belgium no longer have to apply Belgian accounting law. However, branches in Belgium are still obliged to keep accounts for their Belgian activities and to draw up annual accounts in accordance with Belgian law. Companies with a registered office abroad and actual activities in Belgium will still have to draw up Belgian accounts for Belgian corporate tax purposes (but they will be under no obligation to publish them). Moreover, any foreign company with a branch in Belgium is required to file its (consolidated) annual accounts with the National Bank of Belgium, drawn up in accordance with the law of the State to which the company is subject.

Director liability

From now on, Belgian courts will only be competent to hear claims relating to director liability if the registered office of the legal entity concerned is situated in Belgium. Members of the governance body of a legal entity which has its registered office in Belgium can always be prosecuted in Belgium, regardless of whether they are resident in Belgium or abroad.

However, in order to prevent abuse, it is also possible for third parties to bring claims relating to director liability before the Belgian courts against directors of legal entities whose registered office is located outside the EU, provided that the principal establishment is located in Belgium and the legal entity only has a formal connection with the foreign State.

Claims relating to insolvency can still be brought before a Belgian court if the legal entity has its centre of main interests in Belgium.

(No) impact on other legal fields

The adoption of the incorporation theory only has implications for the applicable company or association law. The rules in question deal mainly with the incorporation, existence, legal nature and legal capacity of the legal person, as well as its dissolution and liquidation. In addition, this legal field also includes, for example, the composition, powers and functioning of the bodies, the internal relations among shareholders or members, and the relations between the legal person and its shareholders or members. Finally, they also cover the acquisition and loss of the status of shareholder or member, the rights and obligations attached to securities, liability for violations of company or association law or the articles of association, and the extent to which the legal person is liable to third parties for debts contracted by its organs.

All other legal fields continue to have their own independent connecting factors, which are generally still linked to the place of the company's actual activities, such as tax law (real seat), environmental law (location), employment law (place of employment) and insolvency law (centre of main interests).

In an earlier but related move, the adoption of the incorporation theory was anticipated by relocating the rules on director liability related to insolvency within the insolvency legislation (Book XX of the Economic Law Code). Consequently, this liability applies when the centre of the main interests (COMI) of an insolvent legal person is located in Belgium, even if the registered office is located abroad.

Procedure for cross-border conversion

The Code also introduces a specific regime for an international transfer of registered office and conversion of company form. The new procedures are mainly aimed at ensuring the continuity of legal personality and protecting creditors and shareholders.

Emigration

When a Belgian company transfers its registered office abroad, its legal form must be adapted to the requirements of the relevant jurisdiction.



The registered seat determines the applicable company or association law only. Other legal fields often maintain the location of the actual activities as the relevant criterion of connection.



A new procedure for cross-border transfer of the registered office ensures continuity of legal personality and creditors' and shareholders' protection.

The emigration procedure can be summarised in three stages:

1. **Informing creditors and shareholders** – The governance body draws up a conversion proposal to provide creditors with sufficient information and to enable them to exercise their right to oppose the transfer. Once the conversion proposal has been published in the *Annexes to the Belgian Official Gazette*, creditors have two months to demand security or any other guarantee from the company. In addition, the governance body draws up a conversion report for the benefit of the shareholders, summarising the legal and economic reasons for the transfer and the consequences of the transfer. This report should enable shareholders to take an informed decision on the cross-border conversion. The report must be accompanied by a statement of assets and liabilities and an audit report by the statutory auditor.
2. **Effective decision** – The decision to transfer the registered office is taken by an extraordinary general shareholder meeting with an 80% majority. The cross-border conversion must be established by authentic deed before a notary, failing which it can be declared null and void.
3. **Cancellation of registration in the Crossroads Bank for Enterprises** – The conversion only takes effect upon cancellation of the registration of the company in the Belgian Crossroads Bank for Enterprises. To this end, the company must submit proof of registration in the relevant foreign register of legal entities.

Immigration

When a foreign company establishes itself in Belgium, its legal form must be adapted to the mandatory rules of Belgian company law.

The immigration procedure can be summarised in four stages:

1. **Verification by a Belgian notary** – The conversion is recorded in an authentic deed, upon presentation of documents by means of which the company demonstrates to the Belgian notary that it has complied with the foreign legal requirements. On the basis of this information, the notary will amend the company's articles of association to bring them into line with Belgian law.
2. **Publication** – The notarial deed and the articles of association are published in their entirety in the *Annexes to the Belgian Official Gazette*.
3. **Completion of the cross-border conversion** – The transfer of registered office only takes effect upon registration of the company in the Crossroads Bank for Enterprises.
4. **Opening balance** – To inform interested parties in Belgium of the composition of the assets of the converted company, the company is required to publish an opening balance sheet within 30 days after the execution of the Belgian authentic deed. To this end, the governance body files a statement of assets and liabilities with the National Bank of Belgium.

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