

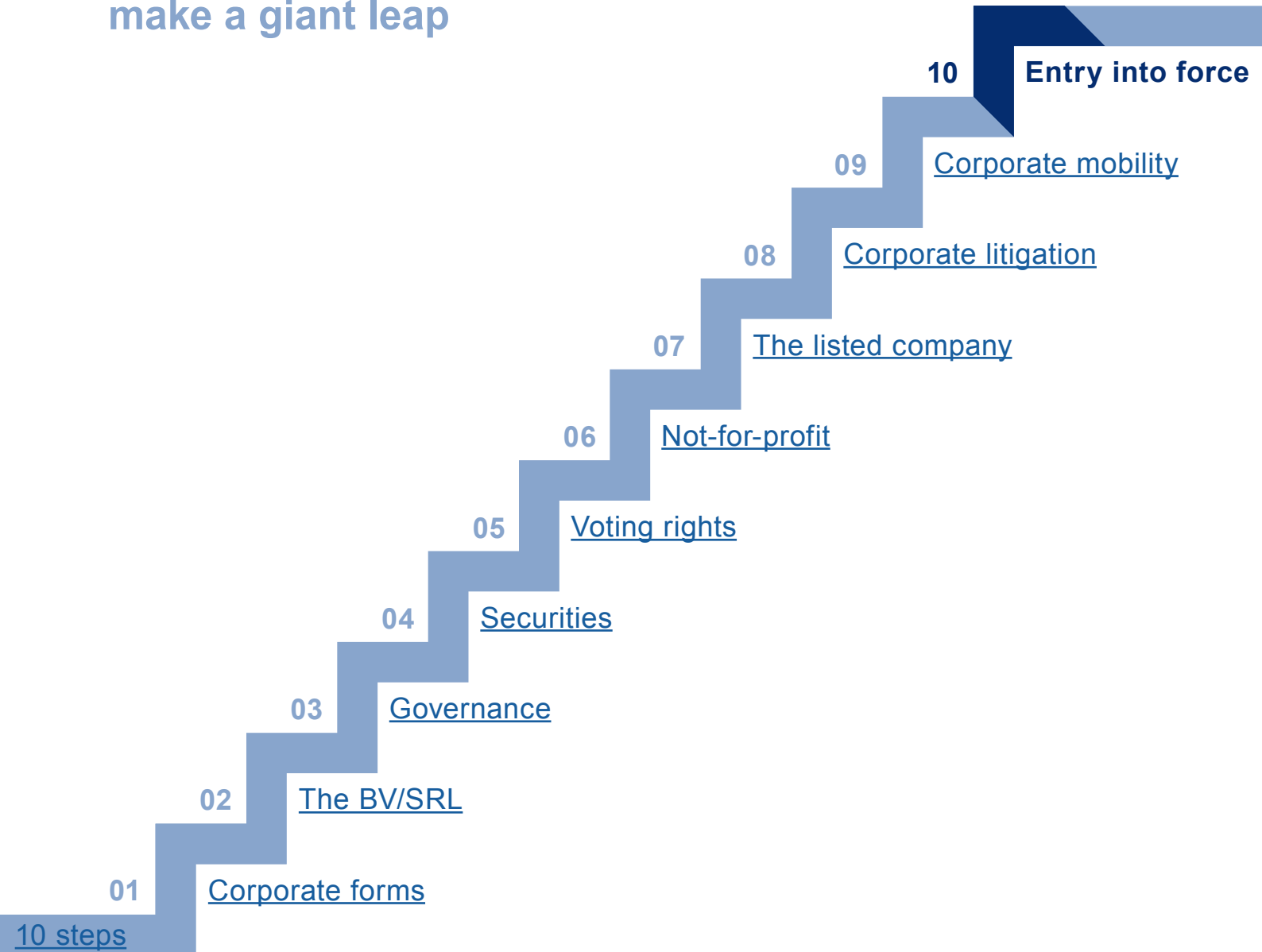
NEW CODE OF COMPANIES
AND ASSOCIATIONS

ENTRY INTO FORCE AND APPLICATION

10

10 STEPS

make a giant leap





ENTRY INTO FORCE AND APPLICATION

“A JOURNEY FROM 1 MAY 2019 UNTIL 1 JANUARY 2024”

The imminent metamorphosis of our companies and associations landscape is so fundamental that it will be crucial to determine unequivocally when the new rules will enter into force and when they will start to apply.

Here is a brief outline of the main stages of the process of entry into force and application.

First rollout on 1 May 2019

With a few minor exceptions, the Code will enter into force on 1 May 2019. The amendments to the Private International Law Code will also enter into force on that date, as a result of which the statutory seat regime will take full effect as of 1 May 2019 (see the brochure on corporate mobility).

However, the entry into force of a rule differs from its temporal application. ***Although the Code enters into force on 1 May 2019, its provisions do not immediately apply in full to (all) Belgian companies and associations as of that date.***

Immediate general application to “new” companies and associations

The Code will immediately apply in full to all newly incorporated companies, associations and foundations as of 1 May 2019. ***In principle, the new legislation will only apply to existing companies, associations and foundations with effect from 1 January 2020.***

To determine whether a company, association or foundation is to be considered as “new”, the date on which legal entities acquire legal personality is key. An NV that is incorporated on 30 April 2019 will therefore be considered as a “new” company in the event that the deed of incorporation is only filed a few days later (on or after 1 May 2019). An organisation without legal personality exists as soon as the agreement is formally entered into, or as soon as its constituent elements are present.


The Code will apply in full to new entities as from their incorporation, although they are of course free to deviate from non-mandatory provisions of the Code.

Possibility to “opt in” for existing companies and associations

However, existing companies, associations and foundations do not have to wait until 1 January 2020 to take advantage of the many opportunities the Code offers. ***The Act introducing the Code allows for earlier application of the Code to existing companies, associations and foundations.*** Existing companies can opt in to the new rules by amending their articles of association in order to bring them **fully** in line with the mandatory provisions of the Code. The Code will then apply as from the date of publication of such amendment in the *Annexes to the Belgian Official Gazette* (and thus not already from the moment the decision to amend the articles of association is taken).

Immediate general application of the new dispute resolution procedure

In contrast to the principle that existing companies, associations and foundations will only be governed by the Code as from 1 January 2020 onwards, the new dispute settlement procedure (withdrawal and exclusion) will already apply to existing BVBA/SPRLs and (non-listed) NVs/SAs as from 1 May 2019, even if the legitimate reasons date from before 1 May 2019, provided however that the relevant legal proceedings have not yet been initiated.



The new rules will apply to new companies, associations and foundations as of 1 May 2019; existing companies, associations and foundations can opt in to the new rules before the end of the transition period, if they so wish.

(Almost) complete rollout on 1 January 2020

General application of the Code

As of 1 January 2020, the Code will apply in full to all Belgian companies, associations and foundations, notwithstanding some specific transitional regimes, some of which are briefly discussed below.

From that date onwards, all mandatory provisions of the Code will apply to existing companies, associations and foundations.

Provisions of the articles of association that are incompatible with mandatory provisions of the Code will be considered as non-existent.

The supplementary provisions of the Code will also take effect from that date, but the articles of association can provide for a different arrangement. The qualification of a legal provision as a mandatory provision or as a supplementary provision is therefore of the utmost importance, as this will determine the extent to which deviating provisions in the articles of association can have effect.


The Code also introduces new names or abbreviations for certain legal forms. These new names and abbreviations will apply as from 1 January 2020, without the need for any amendment of the articles of association (although such companies would be well advised to adapt the name or abbreviation on all documents that they issue). The BVBA/SPRL will thus disappear completely on 1 January 2020: our company law will only know the BV/SRL as from that date.

Mandatory amendment of the articles of association

As mentioned above, **provisions of the articles of association which are contrary to mandatory law will be considered as non-existent as from 1 January 2020**. As a result, existing companies face the risk that their articles of association may no longer be (fully) in accordance with the mandatory legal provisions, although such provisions must nevertheless be complied with. This is the case, for example, with the transformation of the BVBA/SPRL into a company without capital. This situation could lead to considerable confusion and many questions.

The Act introducing the Code therefore obliges existing companies, associations and foundations to fully adapt their articles of association to the Code on the occasion of the first amendment to the articles of association after 1 January 2020, and in any event by 1 January 2024 at the latest. Failure to comply with this obligation will give rise to (joint and several) **director liability** for all ensuing damage (a causal link is required).

The only exception to the obligation to fully amend the articles of association on the occasion of the next amendment to the articles of association concerns amendments resulting from the exercise of the authorised capital or subscription rights (formerly called “warrants”), or the conversion of convertible bonds. This exception has probably been included because such amendments do not necessarily require the intervention of the general shareholder meeting.



The mandatory rules of the Code will apply to “old” companies, associations and foundations as of 1 January 2020.

Mandatory conversion from abolished legal forms

The Code also abolishes various existing legal forms (such as the Comm.VA/SCA) and requires companies with an abolished legal form to convert into another (remaining) legal form (such as the NV/SA).

Until such conversion takes place, companies whose legal form has been abolished will exceptionally continue to be governed by the rules of the Companies Code after 1 January 2020, unless those rules conflict with specific mandatory rules of the Code, in which case the latter will then prevail.

Companies whose legal form has been abolished must voluntarily convert into a new legal form by 1 January 2024, by means of amendment to their articles of association. The specific formalities of the conversion procedure do not have to be complied with in that event. Failure to comply with the obligation to convert to another legal form in a timely manner will give rise – again – to (joint and several) director liability for all ensuing damage.

In the event that a company whose legal form has been abolished fails to voluntarily convert to another legal form by 1 January 2024, it will be automatically converted by operation of law on that date into the closest surviving legal form. Thus, for example, a Comm.VA/SCA will be converted into an NV/SA with a single director on 1 January 2024, and a CVOA/SCRI will be converted into a VOF/SNC (please refer to the brochure on corporate forms for details of other conversions by operation of law).

This automatic conversion is followed by a new term of six months during which the governance body is obliged to convene an extraordinary general shareholder meeting, at which the company must adapt its articles of association to the Code and the new legal form.

Specific arrangements

The legislator has provided for some specific transitional regimes, in addition to the aforementioned regime for the dispute settlement procedure.

For example, the new rules on **director liability** will apply to “events giving rise to damage” that occur after the Code becomes applicable to the legal entity concerned. This means, for example, that the rules of the Companies Code will continue to apply in full to all shortcomings of a director that occur before the Code becomes applicable to the legal entity concerned, even in the event that the director's liability is only invoked after the Code had become applicable to it.

The **fully paid-up capital in the BV/SRL and the CV/SC** (only the paid-up part of the fixed capital) **and the statutory reserve** will, automatically and without any formality, be transformed on 1 January 2020 into statutory non-distributable equity. This equity can be unlocked through an amendment to the articles of association and subject to the new net assets and liquidity tests that need to be complied with. There is no need to comply with the current waiting period of two months during which certain creditors are entitled to require collateral.

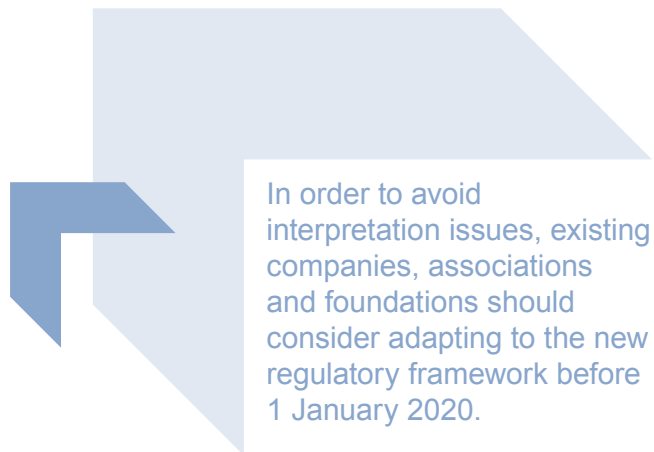
Lastly, existing NVs/SAs may maintain their current **executive committee** (directiecomité/comité de direction) in place after 1 January 2020. This executive committee will continue to be governed by the relevant rules of the Companies Code up until the moment the company concerned brings its articles of association in line with the Code (either on the occasion of the first amendment to the articles of association after 1 January 2020 or by 1 January 2024 at the latest).



End point: 1 January 2024

Based on the detailed transitional regime provided for in the Act introducing the Code, a full rollout of the Code will only be achieved by 1 January 2024. **As of that date, the Code will apply in full to all companies, and all companies should have adapted their articles of association – and, where applicable, their legal form – to the new Code.** Hence, it is only then that we can bid our final farewell to the Companies Code, which can still be applicable in specific situations until then.

However, this endpoint is still 4.5 years away. The parallel existence of the Code and the Companies Code will inevitably give rise to interpretation problems and discussions about the applicable legal provision in the event of conflicting legal provisions. This, however, is not unusual: the transition from old law to new law always raises questions which do not have obvious answers. In order to limit such issues (and thus legal uncertainty) to a maximum extent, it is highly recommended that a thorough review should be made of the articles of association of existing companies, as well as existing (shareholder) agreements and that these should be amended where necessary, preferably already before 1 January 2020 and with effect (at the latest) on that date. This will also allow existing companies to take maximum advantage of the many opportunities the Code has to offer.



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