



## THE REFORM OF THE BELGIAN CORPORATE/ ASSOCIATIONS CODE (CAC)

Presentation at the EAS on 28.02.2019 - Moderator: Adrian HARRIS, President, FAIB

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## FAIB AT A GLANCE

- A federation of international associations in Belgium
- Set up in 1949
- Some 300 members
- Essentially International Not for Profit Associations ("INPAs") of all types: trade and professional associations and NGOs, all of which have representatives at Board level
- Financed by membership fees and sponsorship agreements
- Run largely by volunteer staff, supported by our members for our daily work



## FAIB ON THE GROUND...

- To defend the interests of our members towards the Belgian administration, regulators, etc., by working on the practical issues members face: make life simpler for INPAs and their staff
- To encourage European and international associations to set up in Belgium
- To keep members up to date on regulatory / administrative changes through our publications (FAIB News and guides), events and mails
- To assist members through carrying out and publishing surveys and joint studies in areas within our remit: salary studies, economic surveys...
- To push for the legal recognition of associations and the association movement by Belgian, European and international authorities

## FAIB IN PRACTICE

- VAT: convince Belgian tax authorities to clarify the status of INPAs on the issue of VAT. Outcome: a flexible system which answers the needs of our wide constituency
- European Joint Transparency Register: adoption of a common position on the issue in spite of our wide-ranging membership
- Regular expert-led events on core issues such as taxation in Belgium, social security issues, employment law, GDPR, etc.
- Publication for members of a new section of FAIB's guide for INPAs, dealing with banks and banking obligations
- Support to the European Association Summit (EAS)
- And now, the revision of the Belgian corporate law in areas specifically impacting INPAs

## WHAT NOW?

- Most of you deal with the EU institutions and voluminous legislative documents as part of your daily work....
- But you probably don't want to have to wade your way through the 500+ pages in French or Dutch of the new Belgian law on companies and associations and the forthcoming revision of the finance law...



- So let's try in this session with a little help and guidance from FAIB and our experts to make your life here a little easier...

## MEASURES ENHANCING THE INTERNATIONAL NATURE AND CHARACTERISTICS OF INPAS : FROM ADVOCATING TO MODIFIED BILL BY FRANCIS HOUBEN

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### Measures which contribute to improve the international characteristics of INPAs and their cross-border mobility

- Rules on the nationality of companies and non-profit organizations: from real seat theory to incorporation theory
- Rules enhancing the access to the legal form AISBL – IVZW (INPA) :
  - National conversions : from ASBL to AISBL and vice versa  
from any company to A(I)SBL
  - Transnational conversions: from any kind of foreign legal entity to (international) associations



- **Initial version of the INPA (Law of October 25, 1919):** access through one entrance: the only way to adopt the legal form of INPA consists in creating a new legal entity (still under the current law).



- **The INPA as « upgraded » in 2019, according to the bill** : interoperability and increased accessibility for different types of vehicles: associations as well as companies, established in Belgium or in foreign countries. Cross-border conversion under the regime of continuity of the legal personality.

### First measure - from “real seat theory” to “incorporation theory”: positive news for INPAs

- Purpose of this measure: change the rules determining the nationality of a legal person. In other words: which national law should be applied to a legal entity ?
- Two theories exist : “incorporation theory” and “real seat theory”
  - Formal approach : the incorporation theory: the legal entity is subject to the law of the country where it has been incorporated.
  - Factual approach : the real seat theory, the applicable law is the law of the country where it has its real seat, in other words its head office.

## First measure – nationality of companies and NPO's: from "real seat theory" to "incorporation theory"- positive news for INPAs

- **Drawbacks of the real seat theory applied to INPAs**

- In a certain way, there might be a contradiction between the concept of "international association" and the fact of submitting such a legal form to the jurisdiction of one single country. It should however be stressed that alternatives, like the European Association and the European Foundation, were abandoned.
- The criterion of principal place of management might be less appropriated for INPAs than for other legal forms (companies or national associations).

- **Drawbacks of the real seat theory applied to INPAs (AISBL or IVZW) criterion of main place of management difficult to apply: examples**

- Federations structured as AISBL's often combine G.A. and Board meeting with a congress to be held each year in another country.
- Virtual meetings might be held, rather than physical meetings.
- Rotating secretariat (hosted in one of the member's premises)
- Head office: might sometimes be located at the domicile of the managing director: possible move to another country when a new director is appointed.

Question: Is the requirement of being physically managed from one single geographic point not obsolete in our digitalized world ?

- **What happens under the existing law if real seat is not located in the state of incorporation (in our example Belgium)?**
  - The connecting factor with that state ceases to exist
  - The nationality of the association might be challenged
  - In such a case, the association would no longer be governed by the Belgian law.
- **New approach: real seat theory replaced by incorporation theory**
  - The risk of challenging the subjection of the entity to the Belgian law will disappear.
  - Legal certainty : the **INPAs** will find themselves in a **much more comfortable position**.

## Second measure - enhancing access to legal form of AISBL - IVZW

- **Possibility to operate national conversions**
  - from an existing ASBL into AISBL and vice versa
  - from any existing form of company into A(I)SBL
- **Possibility to operate transnational conversions**
  - Inbound operations
  - From any kind of foreign legal entity into A(I)SBL or foundations
- **Outbound operations**  
from A(I)SBL to any kind of foreign legal entity

- **Possibility to operate national conversions**

- **From an existing ASBL into AISBL (and vice versa)**

For ASBL's extending their activities beyond the borders and considering to operate through an AISBL, nothing was foreseen in the law so far. The only option: liquidating the existing entity and transfer of activities into a new AISBL, which is very cumbersome.

Conversion procedure solves the problem. The cabinet accepted to include this possibility in the bill.

- **From any existing form of company into A(I)SBL**

Ultimately the bill was modified in such a way that a company can convert itself, not only into an ASBL, but also in an AISBL

- **Cross-border mobility of associations: possibility to operate transnational conversions**

**Definition: Cross border conversions include two aspects**

- In the context of a pure cross-border transfer, the registered office of a company is relocated in another state.
- The relocation of the registered office can also coincide with the conversion of the company into a legal form which is foreseen by the legislation of the host state.

**Admissibility of these operations:** might still be controversial.

Most of the time they are not (yet) regulated by national legislation.



## Cross-border mobility of associations: possibility to operate transnational conversions (continued)

By lack of national legal basis, transnational conversions can rely on the European Law: art 49 TFEU : FREEDOM OF ESTABLISHMENT

### 1) Jurisprudence of the ECJ

- Inbound conversion (immigration). *"If a member state allows for the conversion of companies governed by national law, it must also grant the same possibility to foreign EU companies"* (Polbud case)
- Outbound (emigration). *A national law that imposes a liquidation to a company willing to transfer its registered office in another Member State is not compatible with freedom of establishment* (Cartesio case).

- Cross-border mobility of associations: possibility to operate transnational conversions (continued)

### 2) Other EU source: proposal for a directive of April 25, 2018

- The draft of April 25, 2018 intends to modify the EU directive 2017/1132 by inserting a chapter on cross border conversions of companies. EU member states will have to implement this directive in their legislation.
- This directive has not yet been issued.

- **Cross-border mobility of associations (continued)**

### 3) The Belgian bill on transnational conversions

#### a) The Belgian initiative (initial version of the bill)

Belgium took the initiative to go ahead of this directive draft and to adopt on its own rules on transnational conversions.

However, the first version of the bill did not include associations. Unofficially, the Cabinet referred to a literal interpretation of art 54 TFEU (freedom of establishment only applies to companies).

### 3) The Belgian bill on transnational conversions (continued)

#### b) Response from the sector of international associations (FAIB)

- The interpretation of art 54 TFEU might be outdated: Associations are now considered as economic actors. The Belgian bill allows them to carry out economic activities.
- Cross-border mobility and cross-border access should be considered as a natural attribute or characteristic of an INPA.
- Inconsistency with the rationale of the law: modernization. Why should the modernization only concern companies, while associations are left out the scope ?
- International associations play a significant role in the Belgian economy, especially Brussels Region.

### 3) The Belgian bill on transnational conversions (continued)

c) Modification of the bill as a consequence of advocating from the sector of the international associations (FAIB)  
Where do we stand right now?

- All the points of the position papers of the FAIB were ultimately taken into consideration and included in the last draft, which was adopted by the parliamentary commission on December 12, 2018 (second lecture).
- However the draft has still to be voted in plenary session.

### 3) The Belgian bill on transnational conversions (continued)

d) Advantages – access to EU funding - Brexit

The possibility to make inbound transnational conversion accessible to foreign companies (and not only between associations and A(I)SBL) is mainly intended to focus on non-profit entities operating under the legal form of a company, which is usual in Anglo-Saxon countries like the UK or the US

The principle of legal continuity which derives from the transnational conversion is a major advantage as far as eligibility for EU funding is concerned. Call for tenders or call for proposals usually include a condition of existing and showing an experience of at least two years in the relevant area's.



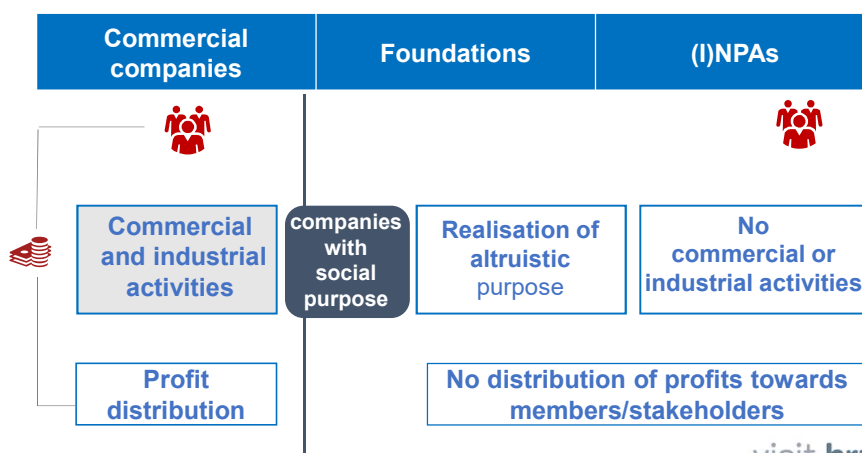
# MAKING INPAs MORE INTERNATIONAL

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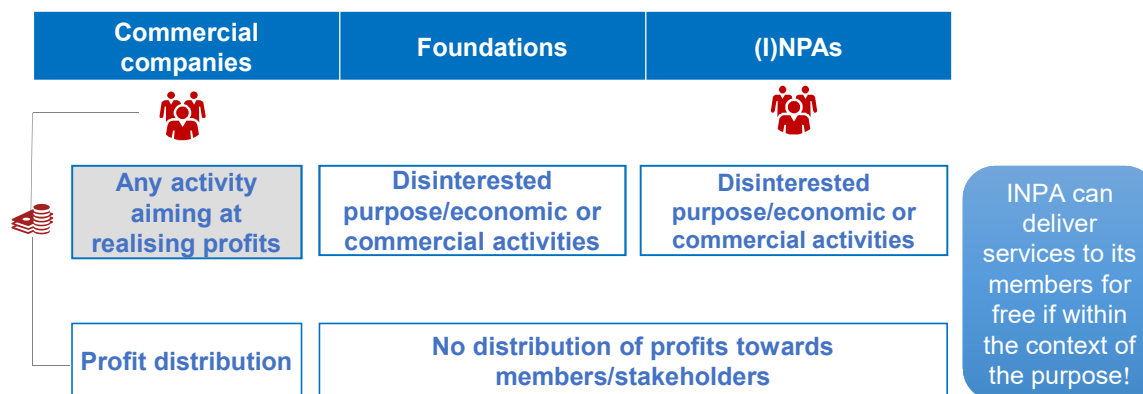
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# SETTING THE SCENE

**Current legal framework**  
*Company Code vs. Law of 27 June 1921*



## NEW CONCEPT OF (I)NPA



## New Concept of (I)NPA An (I)NPA is an enterprise

Since 1 May 2018, all legal entities are an enterprise (new Code on Economic Law)!

The organization can be declared bankrupt or can be subject to judicial reorganization.

Stricter Directors' liability rules in the context of a Bankruptcy

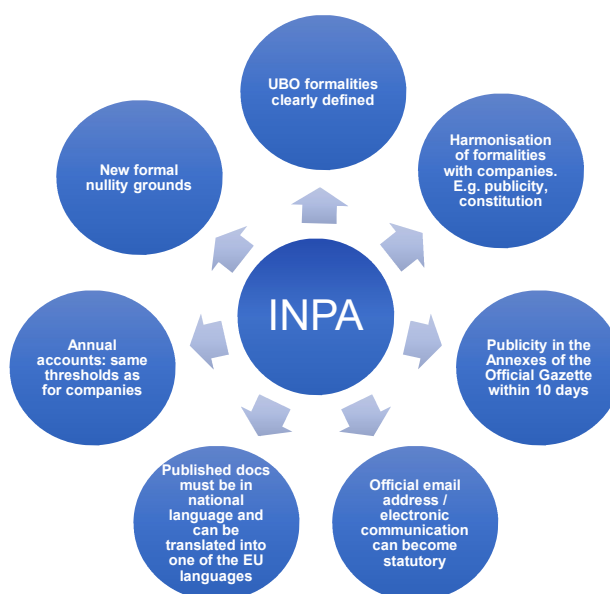
Softer rules regarding proof will apply to all enterprises

Competence of the Court of Enterprises (old commercial court)

New registration rules with the crossroads bank for enterprises and same accounting obligations as companies

Also applicable for entities without legal personality which distribute to their members or other persons having an influence on the policy

## One unified set of general principles for all legal entities



**European Association summit 2019**  
28.02 – 01.03

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# Governing your INPA

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***One unified set of rules for all legal entities***

**One unified set of rules**

- General power of general meeting to decide upon remuneration of directors and termination of their mandate
- Unified set of rules on nullity of the decisions of the corporate organs
- Clear transparency on capacity when signing documents
- All directors – legal entities need to appoint a permanent representative
- If the continuity of the legal entity is endangered, the governing body must take measures to ensure the continuity of the activity for a min. period of 12 months
- Clear rules on the use of "internal regulations"

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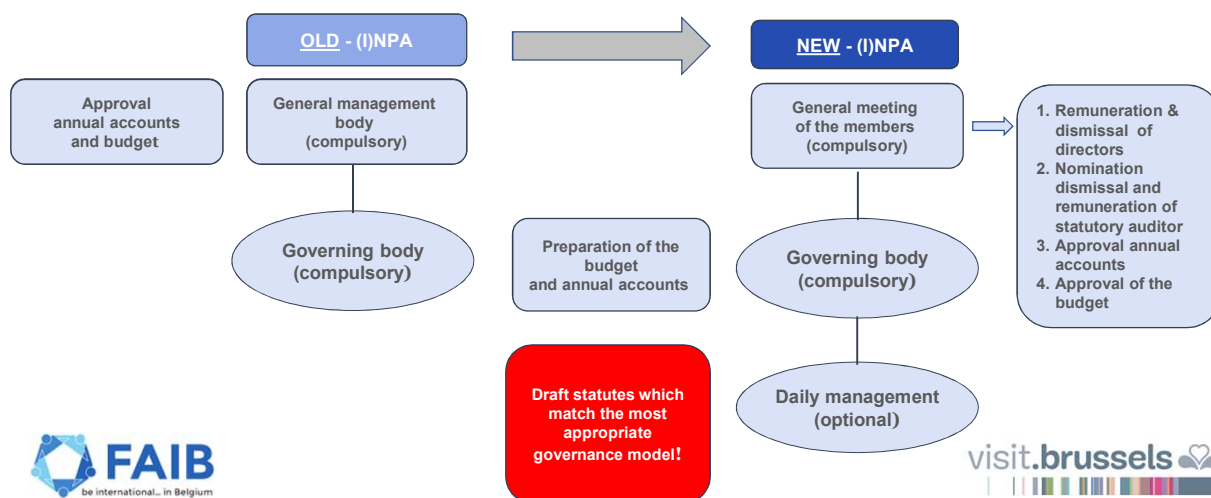


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## Governing your organisation



## Dissolution & liquidation

## Dissolution and liquidation of (I)NPA Current legal framework

Voluntary dissolution & liquidation	<ul style="list-style-type: none"> <li>• Conditions to be included in the articles of association</li> </ul>
Judicial liquidation	<ul style="list-style-type: none"> <li>• Upon request by the public prosecutor or interested third party</li> <li>• Limited grounds (different from NPA)</li> <li>• Reference to NPA for procedure</li> </ul>
Liquidation “de jure”	<ul style="list-style-type: none"> <li>• Expiration of initial term</li> <li>• Fulfilment of condition subsequent</li> </ul>

## Voluntary Liquidation – new procedure for INPAs

Long procedure	One-Act-Procedure
<ul style="list-style-type: none"> <li>• Appointment liquidator(s) - check bylaws</li> <li>• Confirmation nomination by Court: only in case of deficit</li> <li>• Powers: check bylaws/nomination decision</li> <li>• Some decisions of the liquidator must be pre-approved by general meeting</li> <li>• Liquidator needs to comply with several new obligations</li> <li>• More stringent rules for larger (I)NPAs</li> <li>• Payment of due and undue debts in proportion (except for privileged debts)</li> <li>• Distribution of net-assets: should match the purpose of the INPA</li> <li>• Final auditor report at closing (if no auditor, members individual investigative powers)</li> <li>• Court declares the closing of the liquidation</li> <li>• Re-opening of procedure possible upon demand by unpaid creditors</li> </ul>	<ul style="list-style-type: none"> <li>• Possible if: <ul style="list-style-type: none"> <li>• No liquidator is appointed</li> <li>• All debts towards third parties/members have been paid or put in escrow with the confirmation of the auditor/external accountant (exceptions allowed if approved by creditors under certain conditions)</li> <li>• All members are present or represented and decide unanimously</li> <li>• The remaining assets are distributed to a similar non profit purpose</li> </ul> </li> </ul>

## IV. New liabilities of directors of (I)NPAs

### Agenda

- A. Code of Economic Law (insolvency reform)
- B. Companies and Associations Code
- C. UBO obligations

## IV. New liabilities of directors of (I)NPAs

### A. Code of Economic Law (insolvency reform)

Overview of the number of bankrupt (I)NPAs in Belgium between May 2018 and December 2018

	Brussels-Capital Region	Flemish Region	Walloon Region	TOTAL
NPA's	34	57	21	112
INPA	-	-	-	1

## IV. New liabilities of directors of (I)NPAs

### A. Code of Economic Law (insolvency reform)

#### 1) Art. XX. 225

- serious and manifest fault contributing to the association's bankruptcy
- liability for part or all of the debts resulting from the asset shortfall
- not applicable to "small" (I)NPAs and under certain conditions to "large" (I)NPAs

#### 2) 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 undertakings where social contributions were not paid

## IV. New liabilities of directors of (I)NPAs

### A Code of Economic Law (insolvency reform)

#### 3) Art. XX. 227:

- liability of directors questioned by a curator for part or all of the debts resulting from the asset shortfall in case of "wrongful trading", meaning:
  - the directors knew (or should have known) that, at some time before bankruptcy, the association clearly had no reasonable prospect of preserving the undertaking or its activities and avoiding bankruptcy
  - the directors were already acting at the time in a capacity of director
  - at the moment referred to under i., the directors did not act as a normally prudent and diligent director would have acted in the same circumstances
- Not applicable to "small" (I)NPAs

## IV. New liabilities of directors of (I)NPAs

### B. Companies and Associations Code (« CAC »)

#### 1) General principles:

- Common liability regime applicable to (I)NPAs, foundations and companies with legal personality
- Positive description in the CAC of the duty of directors to properly perform their mandate
- Regime applicable to directors, persons entrusted with daily management and “*de facto*” directors
- When the director is a legal person, a natural person must be appointed as its permanent representative and incurs the same liabilities

## IV. New liabilities of directors of (I)NPAs

### B. Companies and Associations Code

#### 1) General principles:

- Joint and several liability of the directors when the Board is organized as a collegial body and – when there is no collegial Board – in case of violation of the CAC or the AoA. Possibility of release from liability when the director (i) did not take part in the misconduct, and (ii) reported the misconduct
- Legal confirmation of the “marginal assessment” theory (decisions/acts/behaviors that clearly exceed the margin in which normally prudent and diligent directors may reasonably have a different opinion when faced with the same situation)

## IV. New liabilities of directors of (I)NPAs

### B. Companies and Associations Code

#### 2) Legal limitation of the liability of directors

- The liability is limited to financial thresholds (250,000 EUR, 1,000,000 EUR, 3,000,000 or 12,000,000 EUR), depending on the annual turnover (membership fees and project financing) & balance sheet total of the (I)NPA
- Limitation applicable to directors & persons entrusted with daily management
- Objective: better insurability of the risks

## IV. New liabilities of directors of (I)NPAs

Average turnover on an annual basis (EUR Excl. VAT) *	And /or	Average balance sheet total (BST) over the same period (EUR) *	Financial limits
Turnover < 700,000	<b>AND</b>	BST ≤ 350,000	250,000 EUR
700,000 ≥ turnover ≤ 9,000,000	<b>OR</b>	350,000 > BST ≤ 4,500,000	1,000,000 EUR
9,000,000 > turnover < 50,000,000	<b>OR</b>	4,500,000 > BST < 43,000,000	1,000,000 EUR
9,000,000 > turnover < 50,000,000	<b>AND</b>	4,500,000 > BST < 43,000,000	3,000,000 EUR
50,000,000 ≥ turnover	<b>OR</b>	43,000,000 ≥ BST	12,000,000 EUR

\* The turnover and balance sheet total are calculated over the three financial years preceding the introduction of the action for damages, or over the period since the incorporation if less than three financial years have passed since this incorporation.

## IV. New liabilities of directors of (I)NPAs

### B. Companies and Associations Code

#### 2) Legal limitation of the liability of directors

- Irrelevance of the number of plaintiffs/defendants (the limitation being applicable to all directors together)
- Irrelevance of the basis of liability: violation of the CAC, of the AoA, of the Code of Economic Law; civil or criminal liability; whether liable towards the (I)NPA or towards third parties; irrelevance of the seriousness of the misconduct
- Limitation applicable by fact or set of facts
- Prohibition of (*ex ante*) release clauses and warranty clauses

## IV. New liabilities of directors of (I)NPAs

### B. Companies and Associations Code

#### 3) Exceptions to the legal limitation of the liability of directors

- Fraudulent intent or intent to cause damage
- Specific tax debts
- Art. XX. 226 of the Code of Economic Law (unpaid social security contributions)
- *De facto* directors?
- Liability based on another ground (e.g. founders' liability)



## IV. New liabilities of directors of (I)NPAs

### B. Companies and Associations Code

#### 4) Practical implications

- Opportunity to review your contracts with insurance companies
- More denunciations by directors are to be expected

## IV. New liabilities of directors of (I)NPAs

### C. UBO obligations

- Directors of (I)NPAs must collect and retain relevant, exact and up-to-date information on the ultimate beneficial owners of the (I)NPAs and register it in the UBO Register
- Administrative fines ranging from EUR 250 to EUR 50,000 and criminal fines ranging from 400 EUR to 40,000 EUR may be applied to directors if they fail to comply with these obligations

## IV. New liabilities of directors of (I)NPAs

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- E. Changes impacting INPA
- F. Changes impacting foundations

### IV. What should you do ?

## I. RESTRUCTURATIONS AND TRANSFORMATIONS

### • RESTRUCTURATIONS

- New: merger and demerger for associations and foundations (A&F)
- Status quo: free contribution of universality or branch of activity → No change (application by analogy of the provisions applicable to companies)

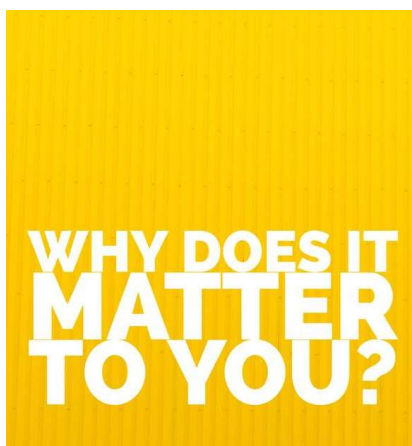
### • NATIONAL TRANSFORMATIONS

- New:
  - Company → (International) non-profit association ((I)NPA)
  - Non-profit association (NPA) ↔ International non-profit association (INPA)
- Status quo:
  - NPA → certified cooperative company (CC) or CC certified as social enterprise

### • CROSS-BORDER TRANSFORMATIONS

- Belgian A/F → Foreign A/F (= emigration)
- Foreign A/F → Belgian A/F (= immigration)

## I. RESTRUCTURATIONS AND TRANSFORMATIONS

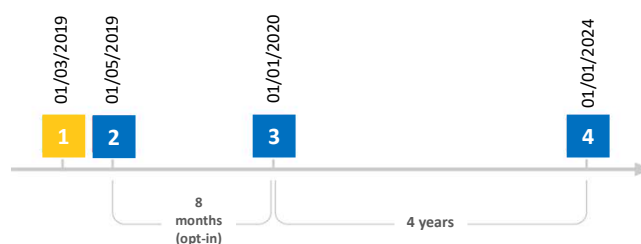


- Increased **mobility** on a **national** and **international** level
- RESTRUCTURATIONS
  - Increased **flexibility** whilst facing the evolution of your A/F
    - Merger → joins forces/means and increased representativity towards the EU institutions
    - Demerger → locate some activities in another vehicle
  - **Easy process** (automatic transfer of all the assets, liabilities and members)
- NATIONAL & CROSS-BORDER TRANSFORMATIONS
  - **Easy process** (automatic transfer of all the assets, liabilities and members)
  - **Continuance** of the legal personality (cf. EU grants)!

## II. ENTRY INTO FORCE

- **May 1<sup>st</sup> 2019:** entry into force of the companies and associations Code (CAC) and immediate application to the **new A/F** incorporated as from this date
- **January 1<sup>st</sup>, 2020:** application of the CAC to the **existing A/F** → double trigger:
  - 1) Application of the mandatory rules and, as the case may be, the residual rules of the CAC; and
  - 2) Time period for bringing the articles of association (**AoA**) into compliance: 4 years (until **January 1<sup>st</sup>, 2024**) OR at the first modification of the AoA.
- **May 1<sup>st</sup>, 2019:** **existing A/F can** decide to apply the provisions of the CAC before January 1<sup>st</sup>, 2020 (“opt-in”), by bringing their AoA into compliance with the CAC.
- **Liability** of the management body (**MB**)

## II. ENTRY INTO FORCE



- 1 = Publication in the Belgian Official Gazette
- 2 = Entry into force of the CAC → applicable to new A/F
- 3 = CAC applicable to the existing A/F
- 4 = End of the transitional period for existing A/F

### III. WHAT IS THE IMPACT OF THE CAC ON YOUR AoA?

#### A. INTRODUCTION



- The **value** of your AoA:
  - Fundamental principles governing your A/F
  - Mandatory rules for the members and bodies of the A/F
  - Completed, as the case may be, by **internal rules** (IR)

Changes brought on by the CAC → Amendments of your AoA

- How the CAC impacts A/F's AoA:
  - 1) Changes impacting A/F
  - 2) Internal rules
  - 3) Changes impacting NPA
  - 4) Changes impacting INPA
  - 5) Changes impacting foundations

### III. WHAT IS THE IMPACT OF THE CAC ON YOUR AoA?

#### B. CHANGES IMPACTING A/F

- **Commercial activities**
- **Region** where the seat of the A/F is established
- MB is competent to **transfer the A/F's seat** and, as the case may be, amend the AoA
- (Alternate) **permanent representative**
- Liability of the directors: prohibition of the **exoneration clauses** and **guarantee clauses**

### III. WHAT IS THE IMPACT OF THE CAC ON YOUR AoA? C. INTERNAL RULES

- MB can adopt IR **if the AoA allow it**
- IR **cannot** contain the following provisions:
  - Contrary to mandatory legal provisions or to the AoA;
  - The matters which according to the CAC shall be governed by the AoA;
  - **The matters related to the members' right, the powers of the bodies or the organisation and the functioning of the general assembly (GA).**

### III. WHAT IS THE IMPACT OF THE CAC ON YOUR AoA? D. CHANGES IMPACTING NPA

- **Minimum number of members:** 3 → 2
- **Minimum number of directors:**
  - 3 directors
  - If less than 3 members → possibility to only have 2 directors
  - → Statutory provision granting to the president a casting vote is not applicable
  - ~~Number of directors < number of members~~
- **Co-option** of directors now allowed
- **Proxies** between directors, if the AoA allow it
- **Unanimous written resolutions** within the MB
- **Conflict of interests** procedure within the MB

### III. WHAT IS THE IMPACT OF THE CAC ON YOUR AoA? D. CHANGES IMPACTING NPA

- **GA's new powers**
- **GA's convening period:** ~~8 days~~ → 15 days
- **Abstentions:** not counted neither at the numerator nor at the denominator

### III. WHAT IS THE IMPACT OF THE CAC ON YOUR AoA? E. CHANGES IMPACTING INPA

- **Founding members**
- **GA's new powers:**
  - Determine the conditions – in particular the financial conditions – under which the mandate of a director is granted, exercised and terminated;
  - Appoint and revoke the statutory auditor and determine his/her/its remuneration;
  - Approval of the annual accounts [and the budget];
  - In all cases in which the AoA require so.

### III. WHAT IS THE IMPACT OF THE CAC ON YOUR AoA? F. CHANGES IMPACTING FOUNDATIONS

- **Minimum number of directors:** 3 → 1
- **Conflict of interest** procedure within the MB
- **Unanimous written resolutions** within the MB
- **Proxies** between directors, if the AoA allow it

### IV. WHAT SHOULD YOU DO?



- **Stay informed**
- **Amend your AoA**: within 1 to 2 years after the entry into force of the CAC → **Opportunity** to improve/fine tune your internal governance
  - Plan in advance the amendment of your AoA:
    - Content = opportunity to upgrade/update your AoA
    - Organisation of the extraordinary general assembly
- **VAT**: commercial activities → Analysis in order to determine the VAT status of your A/F
- **Tax**: commercial activities
- **Insurance**: is your A/F still correctly insured?



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**THANK YOU FOR ATTENTION!**



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