

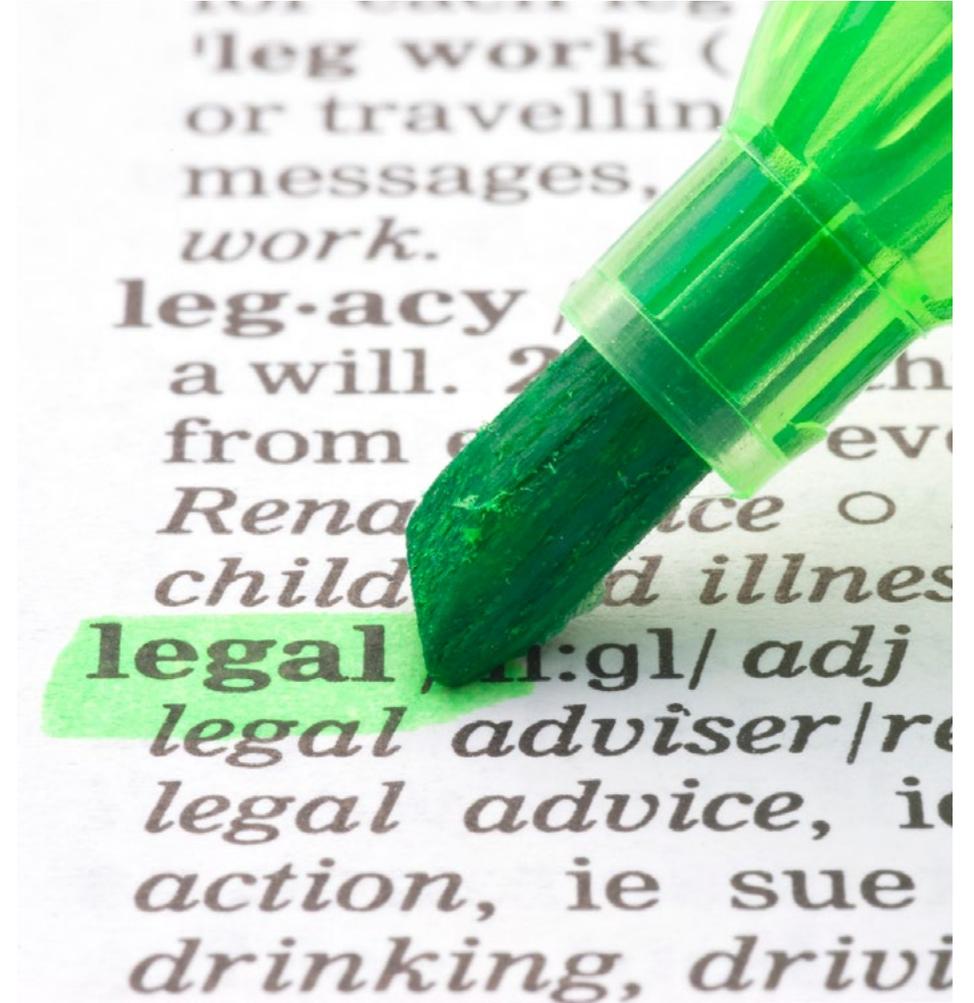
**Laga** 



**Social Elections 2020**

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# Introduction

The next social elections will need to be organised between 11 and 24 May 2020.

Social elections are organised every 4 years to install **the Committee for Prevention and Protection in the Workplace ("CPPW")** and/or the Works Council ("**WC**"), as well as the (re-)election of employee representatives in these consultative bodies.

On 30 April 2019, the Act of 4 April 2019 was published in the Belgian Official Journal. This act regulates the organisation of the 2020 social elections, also adapting and modernising the procedure.

This brochure provides:

- A concise introduction to social elections, with attention given to changes;
- Four practical points of attention that a company must take into account in the run-up to the social elections.

## Who should organise social elections?

Any company that usually employs at least 50 (CPPW) or 100 (WC) employees on average during the reference period must organise social elections.

Company must be defined as the technical business unit (“**TBU**”), which is determined on the basis of economic and social criteria.

The average number of employees is assessed during a reference period from the 4th quarter of 2018 until the 3rd quarter of 2019 included – which is one quarter earlier than during the previous social elections. Each company will therefore know, by 1 October 2019 at the latest, whether it must launch the election procedure in December 2019.

## The stakes: mandates

The number of electable mandates in the CPPW and the WC is determined on the basis of the TBU’s number of employees.

An equal number of substitutes must be elected for each body, in addition to effective employee representatives taking on the mandates.

Provided that at least 15 executives are employed within the TBU, executives may also elect their own representative(s) within the **works council**. If the TBU employs less than 100 executives, there is one extra mandate. When there are more than 100 executives working within the TBU, there are two extra mandates **in the works council**.

Number of employees TBU	Number of mandates
<101	4
101 tot 500	6
501 tot 1000	8
1001 tot 2000	10
2001 tot 3000	12
3001 tot 4000	14
4001 tot 5000	16
5001 tot 6000	18
6001 tot 8000	20
> 8000	22

## Procedure timeline

Each company must evaluate whether it reaches the threshold of at least 50 employees on average. If this is the case, the procedure for organising social elections must be launched.

The procedure's timeline is structured around two key moments:

- Day X, being the date on which the election date is posted; and
- Day Y (i.e. X+90 days), being the date on which the social elections will take place.

The Act of 4 April 2019 stipulates that day Y must fall within the period running from **11 May until 24 May 2020 included**. This means that the pre-election procedure (day X-60) will start between 13 December and 26 December 2019, and that the date of the election date's posting (day X) will take place between 11 February and 24 February 2020.

Y	11 May	12 May	13 May	14 May	15 May	16 May	17 May	18 May	19 May	20 May	21 May	22 May	23 May	24 May
X	11-Feb	12-Feb	13-Feb	14-Feb	15-Feb	16-Feb	17-Feb	18-Feb	19-Feb	20-Feb	21-Feb	22-Feb	23-Feb	24-Feb
X-60 (2019)	13-Dec	14-Dec	15-Dec	16-Dec	17-Dec	18-Dec	19-Dec	20-Dec	21-Dec	22-Dec	23-Dec	24-Dec	25-Dec	26-Dec

## Important dates

Date	Step
<b>X</b> - 60	Initial information – consultation on the TBU's composition
<b>X</b> - 35	Posting of the decision on TBU's
<b>X</b> - 30	Start of the occult protection period
<b>X</b>	Posting of election date within the TBU
<b>X</b> + 35	Submission of the candidates' list
<b>X</b> + 60	Posting of the voting office composition
<b>Y</b> (= X + 90)	Election
<b>Y</b> + 2	Posting of the results



## The digitalisation of the 2020 social elections

### Electronic voting

Going forward, the decision to vote electronically within the company should no longer be taken unanimously by the WC, CPPW or the employer in agreement with the trade union delegation respectively (as was the case during the previous social elections). A simple majority is sufficient. This decision must be published on day X, meaning that it must also be taken before day X.

In addition to the practical benefits, electronic voting also offers guarantees in terms of security and reliability. Incorrect voting as well as later disputes regarding vote validity and the counting process is indeed excluded.

Going forward, in addition to “physical” voting at the voting office (electronic or otherwise), it is also possible to allow employees to vote electronically from their regular workplace, such as their own office. The decision to allow this, as well as the modalities, the conditions to ensure vote secrecy and the definition of “regular workplace” must be taken by the WC, the CPPW or, in its absence, by the employer in agreement with the trade union delegation.

### Electronic posting of information extended

Going forward, it will also be possible for the company’s employees to be informed electronically with regard to the provisional voter lists, the voting office composition, the voters’ notice and the notification of the election procedure’s termination, among others (e.g. through an intranet site – to the extent that all employees have access during their normal working hours).

It should be noted that, in view of the **General Data Protection Regulation** and privacy legislation in general, information containing personal data, such as voter lists, can only be made available electronically on a private platform that is only accessible to the company’s employees (e.g. intranet). The sending of voter lists by e-mail, as well as open publication on the company’s website, must be excluded as this would entail an increased risk with respect to the protection of privacy.

# **First point of attention**

Definition of 'company'

## Who counts as an employee?

Social elections are organised at TBU level. The consultative bodies are therefore also set up at TBU level.

A TBU does not always coincide with the legal entity and must be carefully examined and defined in practice.

The TBU can be described as a business unit characterised by a certain economic and social autonomy. The legislation states that the TBU is determined on the basis of economic and social criteria. If there is doubt, social criteria will prevail.

The assessment's timing is X-35. It should be noted that the TBU's definition is dynamic: a certain business unit that was to be considered as a separate TBU during the 2016 social elections, is not necessarily a separate TBU today.

### **Economic criteria**

- Same/other activities
- Same/other management
- Shareholders
- Accountancy
- Administration
- ...

### **Social criteria**

- Same/other location
- Social activities
- Whether or not HR policy is similar
- Whether or not policies are the same
- Syndical delegation
- Prevention advisor
- Whether or not employment contracts are the same
- Compensation and benefits
- Joint committees
- Common or similar CBA's
- ...

Some scenarios.

1

Legal entity corresponds with TBU



Social elections at TBU level

2

Legal entity composed of several TBU's



Social elections at TBU level unless one or more TBU's do not reach the 50/100 threshold. In that case, TBU's will be merged to reach the threshold.

3

Different legal entities



**Are considered to be one TBU if:**

- The entities (i) belong to the same economic group or (ii) are managed by the same person or by persons having a mutual economic link or (iii) have the same activity or complementary activities; **AND**
- Certain existing elements point in the direction of social cohesion between these entities
  - "Light" version of economic and social criteria
  - Presumption to be invoked only by trade unions and employees
  - Rebuttable

## **Strategic importance of the TBU's definition**

A correct definition of the term 'TBU' has a direct impact on the number of consultative bodies, the number of mandates and consequently candidates. The social dialogue's quality and course within the bodies and the company in general are also affected.

In companies operating across different premises, the question can be raised as to whether the social dialogue in the bodies should take place in a centralised or decentralised manner. This can have an impact on:

- number of meetings and meeting time
- possibility to discuss location-based topics
- need to travel (and travel time)
- local or centrally managed policy



## **Second point of attention**

Follow up on employment numbers  
if the threshold is almost exceeded

## Who counts as an employee?

**“Average number of employees usually employed in a company.”**

The calculation is made on the basis of the employment figures of 4 quarters before the elections (starting from the sixth quarter before that during which the elections take place). Therefore, these are the employment figures from the **fourth quarter of 2018 up to and including the third quarter of 2019.**

The number of employees is determined on the basis of the **DIMONA declarations** or the entries in the personnel register.

Part-time employees are accounted for as follows:

- If at least 75% of full-time working time: to be counted as one employee;
- If less than 75% of full-time working time: to be counted as half employee.

It concerns “regular” employment. The calculation is not purely mathematical. A significant increase or decrease in personnel can have an impact for the assessment.

### **Examples:**

- Significant restructuring completed by end 2019 or in 2020
- Significant employees’ increase for a short period of time (e.g. in hotel/restaurant/bar business).

It is therefore important to keep this in mind in case of ongoing projects of integration or demerger.

### The following employees are taken into account:

**All persons employed within the framework of an employment or apprenticeship contract.** This includes:

- Employees whose contracts are suspended (sickness, long-term disability, accident, maternity leave, time credit, etc.);
- First jobs (startbaanovereenkomsten) – students.

Temporary workers should also be included in the calculation of the usual average employment with the user, except when they replace a permanent worker. For temporary workers, a reference period of the fourth quarter preceding the quarter of the election date – i.e. the quarter from 1 April 2019 to 30 June 2019 – must be taken into account.

During this reference period, the employer must keep a special register in which various data on the temporary workers must be recorded (e.g. the start and end dates of the temporary work and the weekly working time).

An employer is not obliged to keep this special register for temporary workers if, within 30 days after the entry into force – i.e. by **30 May 2019 at the latest** – the WC has unanimously declared that the 100 employees' threshold is exceeded.

An important **new addition** is that every temporary worker has the right to vote with the user where he or she works during at least 3 months or 65 days between 1 August 2019 and 11 May 2020, increased by at least 26 days during the election procedure.

### Are excluded:

- self-employed persons;
- expats seconded to the Belgian company;
- former employees who receive company allowances on top of their unemployment benefits; and
- employees with a replacement contract. (It should be noted that the replaced employee must, of course, be taken into account.)

**Third point of attention**  
Definition of 'management'

## Position of management staff in social elections

Employees with a management function are not eligible to represent employees and therefore cannot be protected as candidates. They also do not have a right to vote.

The employer's delegation is chosen among employees with a management function.

**Note that the management does count in order to determine employment thresholds and number of mandates.** Therefore, whether the executives can have separate lists (and a separate mandate) also depends on the number of employees with a management function.

## Who is part of the company's management?

There are (only) two levels of management within the company within the context of social elections:



### Level 1:

- persons (i) in charge of the daily management of the company, (ii) who are authorised to represent the employer and (iii) to make commitments on the employer's behalf;



### Level 2:

- employees (i) immediately subordinate to persons above in the hierarchy, when they also (ii) perform day-to-day management tasks.

As a result, all employees who are not classified under one of these two levels can never qualify as having a 'management function' within the context of social elections.

The employer decides which positions within the company qualify as management positions.

## Attention points for the 2020 social elections

In preparation of the social elections, the management within the company can be defined by:



### Drawing up or changing the organisation chart

- In practice, the organisation chart is accepted as pertinent evidence if it was drawn up *in tempore non suspecto* and is in accordance with company facts and reality.



### Implementing function-/job descriptions

- Note: the actual execution of functions must correspond to the description.



### Setting up an informal or formal executive committee, formal board of directors or management team

- Note: under the new Companies Code, the formal executive committee will be replaced by a board of directors, which will be accompanied by new corporate governance rules. In principle, an executive committee can only be introduced until 31 December 2019 (but is not recommended, as it will have to be abolished again upon the next articles of association's amendment and, in any case, by 31 December 2023).

## **Fourth point of attention**

Anticipating potential candidacy

## Which employees can apply as candidates for the social elections?

In order for an employee to be able to apply as a candidate for social elections, he/she must meet the eligibility conditions **upon the date of elections:**

- Be an **employee** of the company;
- Age of **minimum 18 years and maximum 65 years;**
- **Not having a management function, nor being internal prevention advisor or person of trust** within the context of the legislation on well-being in the workplace;
- Minimum **seniority of 6 continuous months** (or 9 interrupted months during the year before the elections);
- Being **candidate on only one list** (blue-collar, white-collar or executives); and
- **Belong to the category and TBU** for which he/she applies.

## Can the employer challenge a candidacy?

This is possible but only if (i) the eligibility conditions are not met, (ii) there are irregularities in the submission of the candidates' list or (iii) in case of candidacy abuse.

A strict procedure must be respected by the employer.

In practice, candidacy abuse is rarely accepted by the courts. In its role, the employer will have to prove that the candidate has a hidden agenda and pursues a goal other than being elected (e.g. making dismissal more difficult).

## Protection against dismissal for candidates

An employee who applies or has applied as a candidate in the social elections is protected against dismissal. This dismissal protection applies from day X-30 – i.e. before the employer is formally aware of who is a candidate for the social elections (the candidates' lists should only be submitted on X+35 – or 65 days later). This is the so-called **'occult protection period'**.

If the dismissal of an employee is considered in the short term, it would be prudent to proceed with the dismissal in any case before the start of the occult protection period, which more or less means that the dismissal should preferably be carried out in 2019.

Of course, employers should always verify whether the employee in question was already a candidate or even elected in the previous social elections. Protection from dismissal does apply to effective employee representatives, substitutes and candidates alike.

## Duration of dismissal protection

Employees who have applied as candidates in social elections are subject to a dismissal protection as per the Act of 19 March 1991. A candidate employee representative (including elected effective or substitute employee representatives) can only be dismissed if:

- a serious cause has been recognised in advance by the Labour Court; or
- an economic or technical reason has been recognised previously by the Joint Committee.

This dismissal protection starts on X-30, and ends on the date on which the bodies elected during the next social elections in 2024 are installed. An exception is a situation in which a candidate is not elected for the second consecutive time: in that case, the protection mechanism only applies for a period of 2 years starting on the posting date of election results.

## Continuous protection against dismissal

Finally, it should be noted that if the minimum of 50 or 100 employees required for the establishment of a WC or CPPW is no longer reached within the company, and there is therefore no reason to renew these bodies, the candidates elected during the previous elections will continue to be protected against dismissal under the 1991 Act for a period of six months, **as from 11 May 2020**.

This is also the case when no new elections need to be organised in the absence of required candidacies.





### **About Laga**

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