

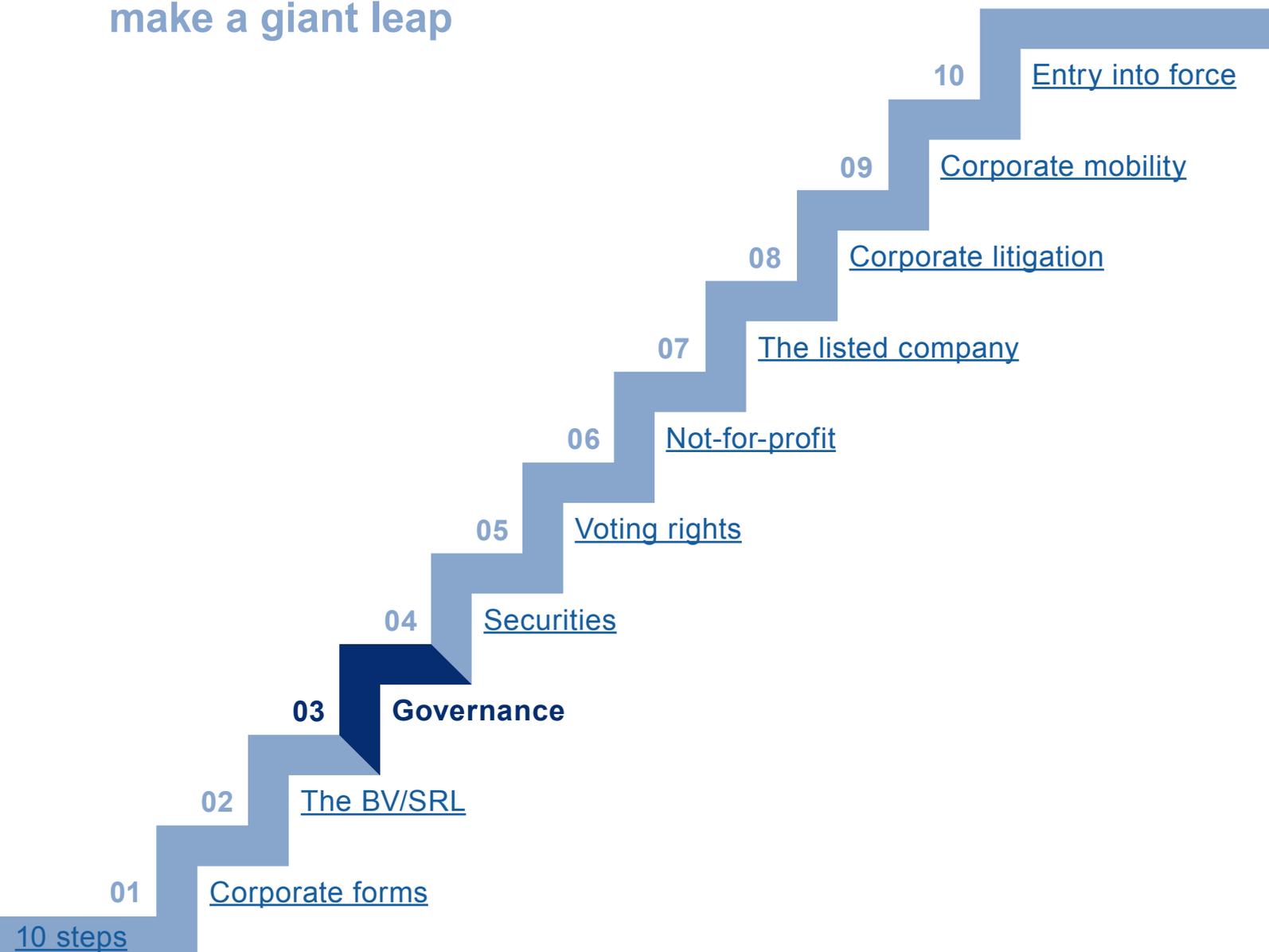
**NEW CODE OF COMPANIES  
AND ASSOCIATIONS**

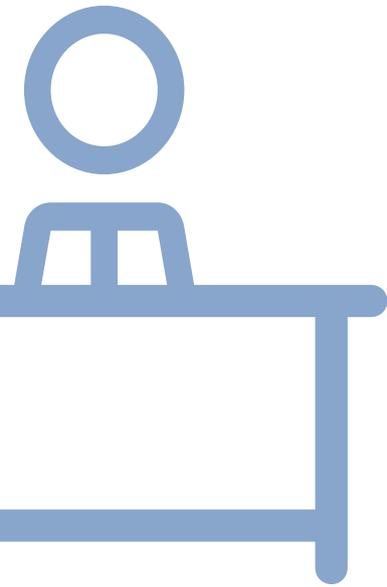
# **GOVERNANCE**

**03**

# 10 STEPS

make a giant leap





03

# GOVERNANCE

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*The Code introduces important new features regarding the governance of companies. Particularly eye-catching among these are new governance models for the public limited liability company (NV/SA) and a cap on director liability.*

We explain the main points below.

## **Three governance models in the NV/SA**

The NV/SA will henceforth be able to choose between three governance models: (i) the one-tier model with a single board of directors, (ii) the two-tier model with a supervisory board and a management board, and (iii) the sole director model.

### **One-tier governance**

The one-tier governance model obviously feels most familiar, since it corresponds to the current “classic” governance model for the NV/SA. In this model, the company has **one governance body – the board of directors**, which is normally composed of at least three directors. In addition, the widespread Belgian practice of de facto management committees or executive committees remains possible in this model. The current limits and uncertainties related to this practice remain.

### **Two-tier governance**

Since 2002 it has been possible to create a management committee (“directiecomité”/“comité de direction”) as a true corporate body, in addition to the board of directors. This two-tier model was still somewhat “unfinished”, however. In terms of membership and powers of the two bodies, there was considerable contractual discretion. The new two-tier model in the Code is much stricter. It even establishes new terminology: the **two governance bodies** are named the **supervisory board** and the **management board** respectively.

The **supervisory board** is a collegial body composed of at least three members. The members are appointed and dismissed by the general shareholder meeting. The supervisory board establishes general policy and strategy, and supervises the management board. The supervisory board is also entrusted with all powers reserved specifically by law to the board of directors in the one-tier model. The supervisory board is responsible for all reports and proposals with respect to restructuring and transformation.

The **management board** is also a collegial body with at least three members. Members are appointed and dismissed by the supervisory board. It is noteworthy that the **members of the management board cannot be members of the supervisory board**, not even the CEO. The two-tier model is applied very rigorously here. By default, the management board has all powers which are

Three governance models are possible in the NV/SA: one-tier governance, real two-tier governance or a sole director.

not reserved to the supervisory board, *i.e.* the **residual powers**. The articles of association may restrict these powers, but such restrictions will have no external effect. By default, the powers of the supervisory board and the management board are mutually exclusive. In other words, matters that fall within the ambit of the management board cannot be evoked and decided by the supervisory board unless this is expressly provided for in the articles of association.

#### **Sole director**

The NV/SA will be able to opt for a sole director. The **sole director enjoys limited liability by default, but the articles of association may provide otherwise**. In other words: this governance model emulates the former partnership limited by shares ("*commanditaire vennootschap op aandelen*" / "*société en commandite par actions*"), which has been abolished as a legal form. The sole director and, as the case may be, his/her successor, may be appointed in the articles of association. It is possible to grant the director veto rights with respect to amendments to the articles of association, distributions to the shareholders and the director's own dismissal.

The sole director may be a natural person or a legal person. In listed companies, the sole director must be an NV/SA which has adopted one of the other two governance models. In that case, a good number of the governance provisions for listed companies are applicable to the governance body of that NV/SA.

### **Dismissal of directors in the NV/SA**

The Code puts an end to the traditional prohibition in Belgium on offering directors of an NV/SA protection against dismissal. The power to dismiss directors *ad nutum* (which means at any time and without severance pay) continues to be the default rule. However, **unless the articles of association provide otherwise, the general shareholder meeting may award a term of notice or severance pay in case of dismissal**. The articles of association may also directly stipulate such arrangements. It will remain possible to terminate the mandate for cause without notice or severance pay.

In the sole director model, dismissal protection may be further enhanced by appointing the director in the articles of association and/or granting him/her a veto against his/her own dismissal. Even then, the sole director may be dismissed for cause at any time by means of an amendment to the articles of association.

## ***Independent directors in listed companies***

Rather than enumerating the criteria for independence, the Code establishes a general test: a director will be considered independent if he/she does not have a relationship with the company or an important shareholder which jeopardises his/her independence. The detailed list of independence criteria is relegated to the reference corporate governance code. A candidate who meets all criteria is considered independent, in the absence of proof of the contrary. Conversely, the company may appoint a candidate who does not meet all the criteria as an independent director if it explains, on the basis of the general test, why the person concerned is nevertheless independent.

At present, the Corporate Governance Code 2009 remains the code of reference. However, we expect the new version of that code, which has been in preparation for a while now, to be published soon.

## ***Daily management***

The Code relaxes the rules regarding daily management. Going forward, the BV/SRL will be able to create a daily management body. Moreover, the Court of Cassation's restrictive definition of daily management is broadened. Daily management will include **acts pertaining to the daily business of the company** on the one hand, and **acts that are either too unimportant or too urgent to justify the intervention of the governance body** on the other.

## ***Conflicts of interests***

The new Code establishes stricter rules on conflicts of interests in the NV/SA and in the BV/SRL while also extending their scope to CVs/SCs, associations and foundations. A conflicted director will no longer be allowed to participate in the decision. This rule was already applicable to listed companies, and it is now being generalised. If all directors are conflicted, the decision must be escalated. Usually, this means that the general shareholder meeting will have to decide. In the dual model in the NV/SA, where the conflict of interest occurs at the level of the management board, the supervisory board is to decide.

The rules regarding "intragroup" conflicts of interests in listed companies have also been refined. Please refer to the separate brochure regarding listed companies for further details.

The stricter rules on conflicts of interests will apply not only to NVs/SAs and BVs/SRLs, but also to CVs/SCs, associations and foundations.

## Director liability

The Code heralds important innovations with respect to director liability. The **new rules apply to all directors of legal persons** – companies, associations and foundations – governed by the Code.

The Code formalises the much-debated technique of “marginal assessment” of director behaviour: directors are only liable for behaviour which “*is clearly outside the margin within which normal and careful directors in the same circumstances can reasonably hold a different opinion*”.

The most striking new feature, of course, is the **introduction of a quantitative cap for the liability of directors**. The cap varies with the size and/or nature of the entity concerned, from EUR 125,000 for the smallest to EUR 12 million for entities such as listed companies and banks. The limit does not apply in cases of gross negligence, fraudulent intent or intent to cause harm. In the final stretch of the parliamentary proceedings, recurring “normal” (light) negligence was also excluded, which sows doubt as to the practical relevance of the cap. A number of specific tax and social security liabilities are also excluded.

## Some other innovations

Governance in the BV/SRL has not changed much. Some terminology has been brought more in line with that of the NV/SA: the BV/SRL will henceforth be governed by “directors” (“*bestuurders*”/“*administrateurs*”). In addition, some substantive differences compared with the NV/SA are removed: a BV/SRL with a collegial governance body will be able to co-opt directors and appoint a daily-management body.

Written decision-making in the board of directors will become easier. The board of directors may now adopt all decisions by means of a unanimous written decision-making procedure, even where there is no explicit basis for this in the articles of association. The articles of association may be more strict. The regime is also extended to the BV/SRL and the CV/SC, as well as to associations and foundations.

The Code also explicitly confirms that the members of governance bodies are self-employed in that capacity and are not employees.

The **rules regarding the permanent representative of a director that is itself legal persons have been tightened**: the permanent representative must be a natural person, and he/she can only serve as a member of the governance body in one single capacity.

Finally, the use of electronic communication is simplified, including for communications between the company and its directors.



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