

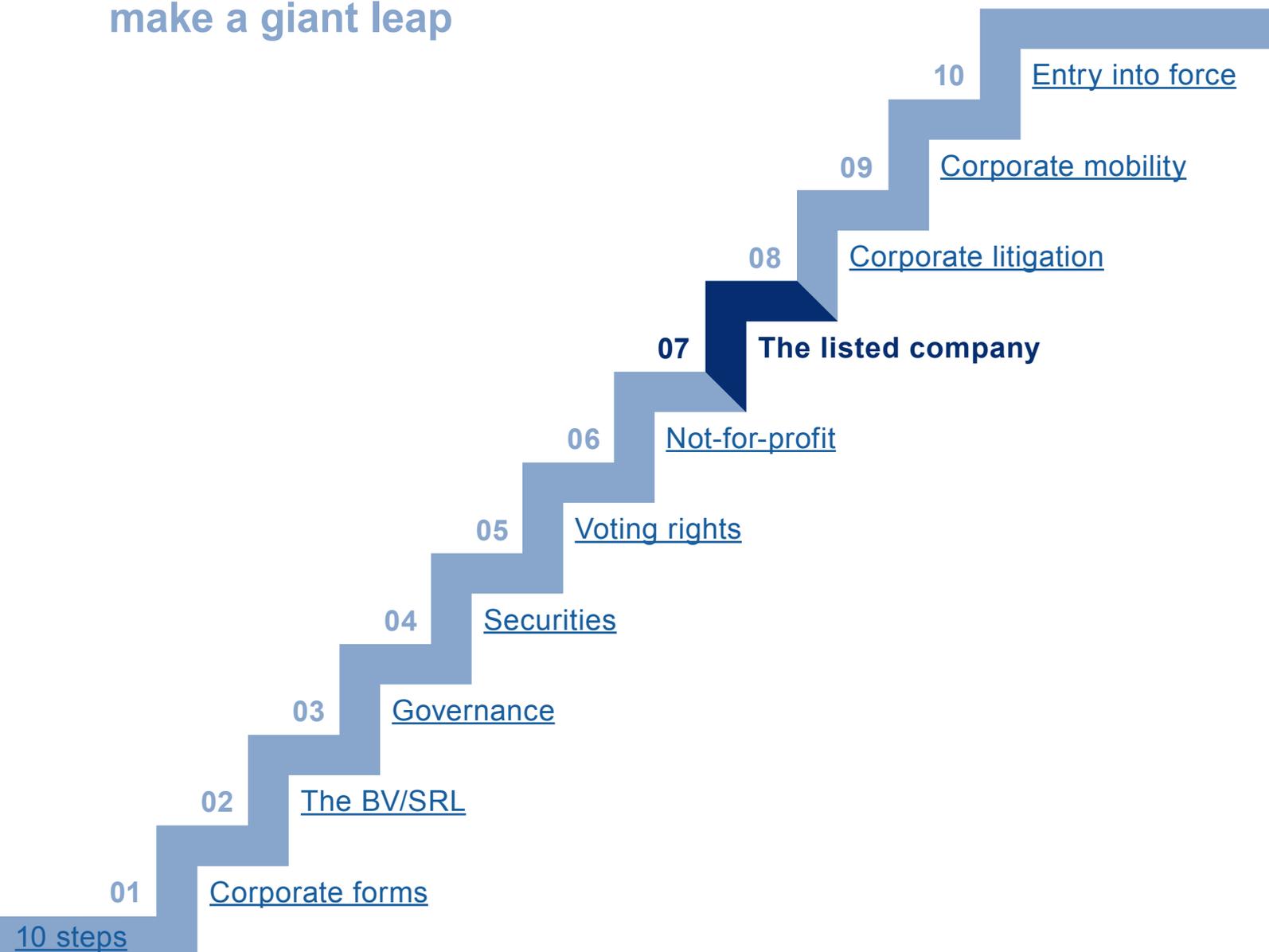
NEW CODE OF COMPANIES  
AND ASSOCIATIONS

# LISTED COMPANIES

07

# 10 STEPS

make a giant leap



# LISTED COMPANIES

## “IMPACT OF THE CODE”

*The Code contains some innovations specifically for listed companies. Particularly eye-catching features include loyalty voting rights and the adapted independence criteria.*

Here is a description of some of the most important changes.

### **Listed companies are “share-listed” companies**

One of the main objectives of the new Code is a thoroughgoing simplification of company law. For this reason, the Code moves away from the notion of “companies that call or have called upon public savings”, and redefines “listed companies” as companies whose shares, share certificates or profit-sharing certificates are admitted to trading on a regulated market (e.g. Euronext Brussels). Thus, if only bonds or notes are admitted to trading on a regulated market, the company falls outside the scope of the particular rules for listed companies. It does remain subject to certain derogating provisions concerning *inter alia* the annual accounts and audit; like listed companies, such companies must also set up an audit committee and respect the gender quota.

The application of some or all of the rules applicable to listed companies can be extended by Royal Decree to companies whose securities are admitted to trading on a Multilateral Trading Facility (MTF) (e.g. Euronext Access or Euronext Growth).

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## Loyalty voting rights

Under the Code, the public limited liability company (NV/SA) and the private limited liability company (BV/SRL) will be able to **issue shares with multiple voting rights**. The determination of the number of voting rights granted to each share will be a matter of contractual freedom to a large extent. For listed companies, this freedom is mitigated and only one type of multiple voting rights will be allowed: so-called “loyalty voting rights”.

If the articles of associations provide for loyalty voting rights, then the shares that have been fully paid up and registered in the share register in the name of the same shareholder for at least two consecutive years will confer a double voting right. For more information on multiple voting rights and loyalty voting rights, please refer to the brochure on voting rights.

## Governance

### Independent directors

The independence criteria cease to be “hard law” and become “soft law”. The existing specific independence criteria will be moved to the new Belgian Corporate Governance Code, which is in preparation, with some small changes. The Code only contains **a new general independence criterion: the director may not maintain a relationship with the company or with a significant shareholder that jeopardises his/her independence.**

A prospective director fulfilling the specific criteria of the Corporate Governance Code is presumed to be independent, subject to evidence to the contrary. If a prospective director does not meet the specific criteria, then the board of directors must set out the reasons why it believes the candidate is in fact independent in the light of the general criterion. In that case, the general shareholder meeting may still appoint the candidate as an independent director.

Moreover, independent directors may no longer receive variable remuneration.

### Gender quotas

The rules regarding gender quotas have not been changed. At least one-third of the members of the board of directors of a listed company must be of a different gender than the other members. If the company has a two-tier governance model, then the gender quotas apply to the supervisory board, but not to the executive board.

### Severance payments

The rules regarding severance payments have been clarified. Contractual severance payments for executive directors and other C-level executives of a listed company which exceed 12 months of remuneration always require the prior approval of the general shareholder meeting. If the severance payment exceeds 18 months of remuneration, then the approval of the remuneration committee is also required.

### Three governance models

An NV/SA can choose between different governance models (see the brochure on governance). The monistic (one-tier) governance model has a board of directors. Alternatively, an NV/SA can opt for a dual (two-tier) governance model, where the operational and strategic duties are split up among a management board and a supervisory board. Finally, an NV/SA can also be governed by a sole director, who can be irremovable and can be granted certain veto rights. This last governance model will be a suitable alternative to the partnership limited by shares (Comm.VA/SCA), which has been abolished as a separate legal form and which is currently mostly used by REITs. For more information on the three governance models, please refer to the governance brochure.

**Listed NVs/SAs that opt for governance by a sole director are obliged to appoint as their sole director another NV/SA which in turn has a collegiate (one-tier or two-tier) governance model.** The governing body of the sole-director NV/SA will have to abide by the special governance rules for listed companies, such as the presence of independent directors and the gender quotas.

An NV/SA with an irremovable sole director to whom certain veto rights have been granted fills the gap left by the abolition of the partnership limited by shares (Comm.VA/SCA).

### Intragroup conflict procedure

Under the Code, a committee of three independent directors must issue a non-binding advice concerning transactions between the listed company (and its subsidiaries) on the one hand and the controlling shareholder (and its subsidiaries) on the other hand, to ensure that potential value transfers between the two groups are subject to increased supervision.

Today, in certain circumstances, the FSMA already recommends also applying the procedure to **mere proposals by the board of directors**, even though the actual decision is taken by the general shareholder meeting. Under the Code, this recommendation has become law, and the scope of application has been expanded to this end. As an example, the board of directors will have to apply the procedure when approving merger proposals. The same goes for proposals concerning demergers or contributions in kind.

The intragroup conflict procedure does not apply to transactions between a listed company and its subsidiaries, nor to transactions among its subsidiaries. In the case of such transactions, any value transfers remain within the listed group, and the controlling shareholder cannot be favoured to the detriment of the minority shareholders of the listed company. However, here too the Code expands the scope of application: the procedure will also have to be complied with when a **subsidiary is involved in which the controlling shareholder, directly or indirectly, through persons other than the listed company, holds at least 25% of the capital or profit rights**. Once the 25% threshold is crossed, the legislator considers it appropriate to make the potential indirect value transfer subject to the procedure.

The Code broadens the scope of application of the intragroup conflict procedure.

## **Change of control clauses**

Unlike with non-listed companies, the change of control clauses of listed companies will still have to be approved by the general shareholder meeting. While this obligation is limited to only “significant” contracts, the chances are that the party with whom the listed company is entering into an agreement will insist that the general shareholder meeting gives its consent for other contracts as well.

In listed companies the approval of change of control clauses in significant contracts remains a requirement.

## **Acquisition and transfer of treasury securities**

The rules concerning acquisition and divestment by a company of its own securities (“treasury securities”) have been amended (see the securities brochure for more information on this topic). A particular point of attention for listed companies is that, under the Code, not only the direct subsidiaries but also the indirect subsidiaries will have to apply the rules concerning equal treatment when acquiring or transferring treasury securities.

## **Listed BVs/SRLs?**

Under the Code, the shares of a BV/SRL may also be publicly traded. However, for a BV/SRL this would entail the application of various special rules, so the expectation is that the majority of listed companies will still be organised as NVs/SAs, which have those rules as part of their DNA.

## **Future: Shareholder Rights Directive II**

The amendments required for the implementation of the Shareholder Rights Directive II (Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC) have not been included in the new Code. Therefore, the Code will need to be amended soon in this regard.

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